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COMING OF AGE: Focusing the Human Rights Lens on
Older Men and Older Women

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I hereby declare that I have read and understood the regulations governing the submission of masters in law (LLM) dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

_____ Date: _____

**COMING OF AGE: Focusing the Human Rights Lens on
Older Men and Older Women**

Jill Adkins
University of Cape Town
Masters in Law (LLM) minor dissertation
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Researching and writing this paper showed me how little I knew, even after twenty years of practicing elder law in the United States. While I had a good grasp of the practical and legal issues facing older persons in Minnesota, I never imagined how these issues pervade virtually all societies around the globe. The United States is a member of the United Nations but generally holds itself apart from international human rights obligations. The language of human rights law seeps into US law only to the extent of civil rights and liberties. For an elder law lawyer from Minnesota, the world of human rights was a foreign one.

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Move over 'global warming' and make room for 'global ageing.'

ABBREVIATIONS

AU – African Union

CEDAW – Convention on the Elimination of all Forms of Discrimination against Women

CIS – Commonwealth of Independent States

COE – Council of Europe

CRPD – Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities

EU – European Union

ICCPR – International Covenant on Civil and Political Rights

ICRMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

ICESCR – International Covenant on Economic, Social and Cultural Rights

MIPAA – Madrid International Plan of Action on Ageing

OAS – Organization of American States

OAU – Organization of African Unity

SADC – Southern Africa Development Community

VIPAA – Vienna International Plan of Action on Ageing

UDHR – Universal Declaration of Human Rights

UN - United Nations

UNDAW – United Nations Division for the Advancement of Women

UNDESA – United Nations Department of Economic and Social Affairs

UNHCR – United Nations High Commissioner for Refugees

US – United States of America

USD – United States Dollar

WHO – World Health Organization

CHAPTER ONE

THE AGEING WORLD AND THE HUMAN RIGHTS OF OLDER MEN AND WOMEN

1. INTRODUCTION

It is most appropriate to open an exploration of the human rights of older persons with the poignant words of Kofi Annan, then Secretary-General of the United Nations, in a statement to the Second World Assembly on Aging in Madrid:

I turned 64 today. I therefore feel empowered to quote a Beatles' song that asks, on behalf of all older persons, and I quote: Will you still need me, will you still feed me, when I'm 64? I trust the answer is yes, older people will be provided for, and yes, older people will be needed in the twenty-first century.¹

The venerability of older persons is a seemingly universal.² Whether such reverence actually translates into meaningful practice is the question at hand.³

The global population is ageing. The proportion of older persons is increasing while the proportion of younger persons is decreasing.⁴ In fact the global population is ageing at an 'unprecedented rate,'⁵ offering both opportunities and challenges. How the international community, collectively and individually, responds to these opportunities and challenges will impact human rights and development.

Kofi Annan eloquently expresses the two sides of the ageing coin: the contribution older persons make to society on the one hand, and their vulnerabilities on the other hand. Older age is too often associated primarily with need and uselessness, leaving the impression that older persons are but a burden on society. While older persons, as a group and individually, undoubtedly experience vulnerability - partly due to

¹ Kofi Annan *Report of the Second World Assembly on Ageing* (2002) A/CONF.197/9 Annex II at 67-68.

² See, e.g. United Nations *Vienna International Plan of Action on Aging* (1982) Report of the World Assembly on Aging UN Doc A/37/51 at para 27 stating: 'The respect and care for the elderly...has been one of the few constants in human culture everywhere...'.
³ See, e.g. Jody Kollapen *The Rights of Older People - African Perspectives* (2008) stating: 'The notion that "we take care of our elders" is still often heard but is increasingly not reflected in reality.' Online:

<http://globalaging.org/elderrights/world/2008/africa.pdf> (accessed 27 October 2009).

⁴ United Nations Department of Economic and Social Affairs, Population Division *World Population Prospects: The 2008 Revisions, Highlights* (2009) Working Paper No. ESA/P/WP.210 at 3.

⁵ Kevin Kinsella and Wan He *An Ageing World: 2008* (2009) United States Census Bureau, International Population Reports P95/09-1 at 1.

discrimination and neglect of their particular human rights concerns - older persons also possess untapped potential for participating in and contributing to society.

The themes related to ageing and the human rights of older persons are multifaceted. While the ageing experience varies between more and less developed countries,⁶ the concerns of older persons around the world exhibit remarkable similarities. That the concerns of older women have languished within the broader discussion on older persons is one of those similarities.

Highlighting the particular human rights issues of older women is not intended to diminish the issues of older men. Discussions about contributions, capabilities, needs and vulnerabilities apply to both women and men. It is undisputed, however, that older women generally experience ageing differently due to their longer lives and the cumulative effect of discrimination throughout their lifetimes. The feminization of ageing and the feminization of poverty are universal trends. While the concerns of women found early advocacy in the human rights community, the particular concerns of older women have emerged relatively recently in human rights and development discourses.

The human rights lens is an approach for analyzing the experiences of older men and women. The law of human rights creates obligations for governments and, sometimes, private actors to respect, protect and fulfill the rights which attach to people by virtue of their humanity.⁷ Human rights emerge through 'hard law', such as treaties which bind ratifying states, and 'soft law', such as policies and plans which develop and expand upon treaty norms.

Older persons have been the subject of inconsistent focus within the human rights lens. The human rights of older persons get filtered and diluted through general treaty provisions, leaving policy to create norms without obligations. The query is whether the human rights framework fully embraces each of us as future older persons.

⁶ This essay interchangeably refers to nations and regions of the world as 'developing' and 'less developed' or 'developed' and 'more developed.' These terms are borrowed from the realms of statistics and development which use the terms for convenience. The use of these terms implies no qualitative statement about the country or region being referred to.

⁷ United Nations High Commissioner for Human Rights *Frequently asked questions on a human rights-based approach to development cooperation* at 3 (2006); online: www.un.org/depts/dhl/humanrights/toc/toc9.pdf (accessed 29 October 2009).

2. RESEARCH METHODOLOGY

The purpose of this essay is to examine the experiences and concerns of older men and women, determine whether the existing human rights systems adequately incorporate those concerns, and explore the possibility of a United Nations (UN) convention on the human rights of older persons. This essay emphasizes primary rather than secondary literature review. International and regional treaties and documents are critiqued, in addition to reports, statistics and studies which support an evidence-based approach to analyzing whether the human rights of older persons are covered in existing law and policy.⁸

Chapter One of this essay describes the global ageing statistics which underlie the urgency for robust analysis of an ageing world's consequences. This chapter briefly explores the impact of an ageing population on development efforts before turning to the contributions of older persons and the experiences of older persons which impact their human rights. This chapter also examines the situation of older women in particular.

Chapter Two surveys the history and development of the rights of older persons within the international human rights framework. Starting with the Universal Declaration of Human Rights and culminating in current activity at the UN, this chapter follows the birth and maturation of human rights issues of older men and women.

Chapter Three examines the history and development of the human rights of older men and women within regional human rights frameworks.

Chapter Four compares the experiences of older men and women to the protections and policies existing within the international and regional human rights frameworks. This chapter argues that these frameworks produce fragmented and underdeveloped protection of the human rights of older men and women. This chapter advocates for a UN convention which would coordinate responses to the human rights of older men and women.

⁸ The scope of this essay does not permit examination of cases and complaints/reports under the international and regional systems; neither does it permit analysis of the law, policy and case law of individual nations as pertaining to older persons.

3. DEFINING OLDER PERSONS: Who are they?

'Age is one of the characteristics of social differentiation. While being a biological fact, the perception of age is nevertheless socially constructed.'⁹
Robert Venne

How an older person is identified carries significance for research, not to mention law, services, and benefits directed at older persons. Age might seem to be the logical indicator for older persons. The United Nations uses age 60 and older to determine who is an older person¹⁰ as does the World Health Organization (WHO).¹¹ In the United States¹² and Europe,¹³ however, age 65 generally marks the beginning of older age. Within those aged 60 or 65 and older, there exists those persons aged 80 and older who will be referred herein as the 'oldest old.'

Assigning a specific age to 'old age' is less clear than it may appear, however: '[f]actors such as life expectancy, which will vary among women and men, and health and economic conditions, are relevant in considering who is old.'¹⁴ In rural areas of developing countries, a person's actual age may be uncertain due to lack of birth registration¹⁵ and old age may instead be determined by physical characteristics:

The colour of a person's hair, failing eyesight and diseases such as arthritis are some features used to define an older person. More complex definitions embrace a host of social and cultural issues and may include, for example, the person's seniority status within his/her community and the number of grandchildren....¹⁶

⁹ Robert Venne *Mainstreaming the concerns of older persons into the social development agenda* (2006) Position Paper for United Nations Department of Economic and Social Affairs; Online <http://www.un.org/esa/socdev/ageing/documents/mainstreaming/positionpaper.pdf> (accessed 5 October 2009)

¹⁰ UNDESA note 4.

¹¹ World Health Organization *World Health Statistics 2009* Table 9; online http://www.who.int/whosis/whostat/EN_WHS09_Table9.pdf (accessed 27 October 2009).

¹² Yvonne Gist and Lisa Hetzel *We the People: Aging in the United States* (2004) United States Census Bureau, Census 2000 Special Reports; online http://www.census.gov/prod/2004pubs/censr_19.pdf (accessed 27 October 2009).

¹³ Eurostat; online: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&code=tps00028&plugin=1> (accessed 27 October 2009).

¹⁴ United Nations High Commissioner for Refugees *The Protection of Older Persons and Persons with Disabilities* (2007) EC/58/SC/CRP.14 at footnote 4.

¹⁵ World Health Organization *Definition of an older or elderly person* World Health Organization website at <http://www.who.int/healthinfo/survey/ageingdefnolder/en/html> (accessed 27 October 2009).

¹⁶ HelpAge International *Ageing Issues in Africa: A Summary* (2001); online: <http://www.helpage.org/Resources/PolicyReports> (accessed 27 October 2009).

Tying older persons to a particular age for statistical purposes can be difficult. A study of grandmothers caring for orphaned grandchildren in South Africa discovered that targeting women age 55 and older significantly reduced the size of its sample population.¹⁷ The age of the 'older' grandmothers caring for these orphans was younger than anticipated.¹⁸

Practical and cultural barriers to determining a person's precise age or who is old complicate research. A flexible identification of older persons holds 'methodological and widescale policy implications,'¹⁹ which likely explains why the African Union's policy on ageing encourages the standardized use of age 60 for research and data collection convenience.²⁰

The changing nature of older age is a matter impacting both developed and developing regions. A Canadian report observes that '[c]hronological age as the defining marker of being old is being eroded.'²¹ Nations often define older age within the retirement context.²² Tying the definition of an older person to retirement age may be inappropriate, however, for individuals in the rural agricultural sector who continue to work until physically unable.²³

This discussion intends only to question bright-line assumptions about when older age begins and to introduce the idea of older age as a flexible concept rather than a fixed one. How a nation would administer a policy for older persons that relies on definitional factors other than (or in addition to) chronological age is a matter for creative debate.

¹⁷ Monica Ferreira et al *Older women as carers to children and grandchildren affected by AIDS: a study towards supporting the carers* (2001) Institute of Ageing in Africa, University of Cape Town at 7; on file with author.

¹⁸ Ibid.

¹⁹ Sergei Zelenev *Towards a "society for all ages": meeting the challenge or missing the boat* (2008) 58:190 International Social Science Journal 601 at 612.

²⁰ African Union *AU Policy Framework and Plan of Action on Ageing* at section 4.2; online <http://www.helppage.org/Resources/Policyreports#1118337558-0-11> (accessed 27 October 2009).

²¹ Canadian Special Senate Committee on Aging *Issues and options for an aging population* (2008) Second Interim Report at 2; online www.senate-senat.ca/age.asp (accessed 18 October 2009).

²² WHO Definition note 15.

²³ Kollapen note 3 at 4.

A number of words or phrases are used internationally in referring to older persons or older age, including aged, elderly, the third age, and the ageing.²⁴ This essay prefers 'older persons,' unless discussing a text which uses a different term.

The following section describes the magnitude of the world's ageing situation. No doubt this burgeoning population cohort will challenge existing notions about ageing and the capabilities of older persons, perhaps eventually making one's birth date an outdated lens for defining the ageing experience.

4. STATISTICS: the shifting sands of time

4.1 Introduction. Older persons possess human rights irrespective of their numbers in the global population. Accepting the presumption that human rights have a legitimate basis, then it must also be accepted that human rights adhere to each person and not merely to individuals in those groups possessing the greatest numbers. However, the incredible worldwide growth in the number and proportion of older persons is undeniable - as is the fact that women constitute the majority of older persons. These facts are critical in assessing the human rights implications of the ageing phenomenon and its impact on development. Development and human rights themes emerge, often critically enmeshed, from the ageing phenomenon and its accompanying trends. Thus, a solid foundation in the statistics behind the ageing story is vital.

In terms of raw numbers and proportions of total population, global ageing is transforming societies. Two population groups lead the numbers: women and the oldest of the old. Ageing themes vary between more developed nations and less developed nations. Certain countries exhibit localized trends. This section outlines the evidence behind the population transformation, relying on recent reports from the UN²⁵ and the United States Census Bureau.²⁶ The UN report counts persons aged 60 and over and projects to the year 2050. The US report counts persons aged 65 and over

²⁴ Committee for International Covenant on Economic, Social and Cultural Rights *General comment No. 6, The economic, social and cultural rights of older persons* (1996) E/1996/22 at 20, para 9.

²⁵ UNDESA note 4.

²⁶ Kinsella note 5.

and projects to the year 2040. Both reports count the 'oldest old' as persons aged 80 and over.

4.2 Raw numbers. Both reports anticipate remarkable growth in the size of the older population. The UN projects the current 757 million older persons (60 and older) to be two billion by the year 2050.²⁷ The US report projects the number of older persons (65 and older) to reach 1.3 billion by year 2040.²⁸ The number of older persons in more developed regions of the world will increase from 264 million to 416 million by 2050.²⁹ Less developed regions of the world face an even greater increase in the number of older persons - from 473 million currently to 1.6 billion by 2050.³⁰ In terms of percentages, the more developed regions of the world will thus see a 50 percent increase in its older population by 2050 while the older population in less developed regions will more than triple.³¹

Looking at individual countries, Singapore expects a 316 percent increase in its population age 65 and older by the year 2040; for China the increase is 209 percent; for Kenya the increase is 260 percent; and the United States expects an increase of 107 percent.³²

4.3 Proportions. In terms of proportions of total population, both reports forecast the eclipse of older persons over children. As the number of older persons rises in conjunction with a decline in overall fertility, the consequence is population ageing: a decreasing proportion of children under age 15 with an increasing proportion of older persons.³³ The current 27 per cent of children in the world population is projected to be 20 per cent by year 2050, while the percentage of older persons is predicted to rise from 11 to 22 per cent during the same time period.³⁴

Proportions and percentages vary between more and less developed areas of the world. The less developed regions already hold 64 percent of the world's total older

²⁷ UNDESA note 4 at x.

²⁸ Kinsella note 5 at 7.

²⁹ Kinsella note 5 at viii.

³⁰ Ibid.

³¹ Ibid.

³² Kinsella note 5 at 13.

³³ Kinsella note 5 at 3.

³⁴ Ibid.

population and that percentage is projected to be 79 percent by 2050.³⁵ The percentage of older persons in more developed regions currently outnumbers that of children, 22 percent compared to 17 percent.³⁶ By the year 2050, the ratio of older persons to children will be 33 per cent to 15 per cent. In less developed regions, the current percentage ratio is nine per cent older persons to 29 per cent children.³⁷ By the year 2050, those percentages are projected to be equal at 20 per cent each.³⁸

The rate of population ageing has differed between regions of the world. Population ageing occurred slowly for developed countries, over the course of a century.³⁹ Developing countries, however, are experiencing 'a sudden rise in the number and percentage of older people, often within a single generation' which is described as the 'compression of ageing.'⁴⁰

4.4 Causes. Population ageing results from twin forces: fewer births and longer lives. Global life expectancy rose from 47 years to 68 years between 1950 and 2010 and is projected to reach 76 years by 2050.⁴¹ Life expectancy gains continue in less developed regions of the world although these regions are projected to lag behind more developed regions in 2050, at 82.8 years versus 74.3 years.⁴² Fertility rates similarly vary between more and less developed regions, with most developed countries experiencing below replacement fertility rates.⁴³

The HIV/AIDS pandemic, with its concomitant reduced life expectancies, has positioned certain nations to witness a decrease in overall population size simultaneously with an increase in its ageing population. For example, the prevalence of HIV/AIDS has caused South Africa's life expectancy to fall from 60 years in 1996 to 43 years by 2000.⁴⁴ South Africa's total population is expected to decrease by 8.4

³⁵ Kinsella note 5 at x.

³⁶ UNDESA note 4 at 4.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Kinsella note 5 at 14.

⁴⁰ Ibid.

⁴¹ UNDESA note at 11.

⁴² Ibid.

⁴³ Kinsella note 5 at 22; UNDESA note 4 at xi.

⁴⁴ Kinsella note 5 at 23.

million persons by the year 2040,⁴⁵ but the number of older persons is expected to increase 47 per cent in the same time period.⁴⁶

4.5 The oldest old. The oldest old (aged 80 and over) is the world's fastest growing population group, a 'social phenomenon without historical precedent - one that is bound to alter previously held stereotypes.'⁴⁷ The oldest old are expected to expand their global numbers from 106 million to 395 million by the year 2050, with 69 percent (240 million) living in developing countries.⁴⁸ Japan currently leads all nations with its oldest old already constituting over six percent of its total population.⁴⁹ Between 2008 and 2040, total global population growth is expected to be 33 percent; population growth of those aged 65 and over is expected to be 160 percent; but population growth of the oldest old is projected at an astounding 233 percent.⁵⁰

4.6 Older women. The feminization of ageing exists in all regions.⁵¹ Women live longer than men⁵² and thus hold majority status in the global older population. Women currently constitute 54 per cent of the population aged 60 years and older, and 63 per cent of those 80 years and older.⁵³ As noted above, the oldest old is the fastest growing population group. Since women comprise 63 percent of the oldest old, it is more precise to say that the women aged 80 and older are the world's fastest growing population group. The life expectancy gap between men and women is expected to narrow for more developed regions but expected to widen for less developed regions by 2050.⁵⁴ Not only are women more likely to reach older age, but they experience older age differently than do men as discussed in section 6.4.

4.7 Conclusions. While the population and census reports vary slightly in methodology, their common conclusions are inescapable. The world will continue to

⁴⁵ Ibid.

⁴⁶ Kinsella note 5 at 13.

⁴⁷ Kinsella note 5 at 2.

⁴⁸ UNDESA note 4 at 4-5.

⁴⁹ Ibid.

⁵⁰ Kinsella note 5 at 26.

⁵¹ Zelenev note 18 at 606.

⁵² UNDESA note 4 at 12.

⁵³ United Nations Secretary-General *Follow-up to the Second World Assembly on Ageing* Report of the Secretary-General UN Doc A/64/27 (2009) at para 3; online <http://daccessdds.un.org/doc/UNDOC/GEN/N09/392/74/PDF/N0939274.pdf?OpenElement> (accessed 28 October 2009).

⁵⁴ UNDESA note 4 at 12.

see explosive growth in the numbers and proportions of older persons, most of whom will be women. These older persons will continue to live even longer. Developing regions of the world will experience population ageing at a rate far faster than did developed regions. Developing regions will house the vast majority of the world's older persons. Older persons sit poised to exert significant influence on development policies.

5. AN AGEING POPULATION'S IMPACT ON ECONOMIC DEVELOPMENT

'Such massive demographic changes point to major challenges for development.'
Report of the United Nations Secretary-General, 2009⁵⁵

Setting aside pure human rights obligations for the moment, why should any entity - governmental or private sector, international or local - care about the future which the ageing statistics foretell? The answer lies in an ageing population's potential to affect the growth of productivity and the resulting, if any, policy responses. Either the capabilities of older persons can be harnessed to support productivity or the needs of older persons can be allowed to drain a nation's resources:

...population aging produces myriad challenges to social insurance and pension schemes, health care systems, and existing models of social support. It affects economic growth, disease patterns and prevalence and fundamental assumptions about growing older.⁵⁶

The scope of this essay permits only brief examination of the implications which population ageing brings to development. These implications may, in some instances, provide the primary impetus for policy shifts which accommodate the human rights of older persons - thus illustrating the synergistic link between development and human rights.⁵⁷

An ageing population affects growth in national productivity. Fewer workers and older workers will likely reduce economic growth.⁵⁸ Cross-country evidence links the size of an older population to 'a statistically significant impact on growth of real GDP per

⁵⁵ UN 2009 Follow-up note 53 at para 4.

⁵⁶ Kinsella note 5 at 131.

⁵⁷ Zelenev note 18 at 605.

⁵⁸ The Economist *A slow-burning fuse - A special report on ageing populations* June 27, 2009 at 2; online: www.weforum.org/pdf/GLF/ASlowBurningFuse.pdf (accessed 30 September 2009).

capita.⁵⁹ Growth is negatively impacted through 'lower innovation and entrepreneurship'⁶⁰ and an increasing 'older dependency ratio' which reflects the increasing numbers of persons over age 64 as compared to working aged persons of 24 to 64.⁶¹ Japan and Europe lead the trend of decreasing proportions of working age persons and the economies of both regions will be challenged to remain competitive.⁶²

A particular challenge for less developed nations is coping with an ageing population while yet in the midst of 'developing'. An oft-quoted observation is 'while the developed economies got rich before they got old, developing countries are getting old before they get rich.'⁶³ This remark reflects that advances in health have progressed faster in developing regions than have advances in 'production, income distribution, training, education, housing, institutional modernization and social development',⁶⁴ thus creating older populations with inadequate support and services. All nations face ageing issues related to poverty, employment, and health care, but developing nations juggle these issues in a resource arena with numerous competing priorities. To further complicate matters, developing regions with high rates of AIDS-related deaths, such as Southern Africa,⁶⁵ lose adults 'in the prime of their working and parental careers, creating the potential for severe shocks to economic and societal structures.'⁶⁶

Of concern for any nation is how the world's fastest growing group, those age 80 and older, 'consumes resources disproportionately to its overall population size.'⁶⁷ The longer a person lives, the longer that person draws on a publicly funded pension. The

⁵⁹ UNDESA note 3 at 4.

⁶⁰ Ibid.

⁶¹ Kinsella note 5 at 79.

⁶² See, e.g. Ashgar Zaidi and Alexandre Sidorenko *Features and Challenges of Population Ageing using the European Perspective* (2008) No. 2008/5 of the WDA-HSG Discussion Paper Series on Demographic Issues, University of St. Gallen; online http://www.wdassociation.org/_projects/uploads/1/5_WDA-DP-2008-05-Ashgar_Zaidi_Sidorenko.pdf (accessed 27 October 2009); and Shigeo Morioka 'Japan' in *Global Aging Report – Threats to Longevity, Call to Action* (2009) International Longevity Center Global Alliance at 42.

⁶³ Richard Holzmann and Richard Hinz *Old-Age Income Support in the 21st Century - An International Perspective on Pension Systems and Reform (A Report of the World Bank)* (2005) The World Bank, Washington DC at 25; The Economist, note 57, states that a Chinese academic, Wu Cangping, claims to have coined this phrase.

⁶⁴ Vienna Plan note 2 at para 31.

⁶⁵ UNDESA note 4 at 13, finding that 51 per cent of all deaths in Southern Africa now occur in persons aged 20 to 49.

⁶⁶ UNDESA note 4 at 14.

⁶⁷ Kinsella note 5 at 25.

longer a person lives, the more likely it is that she will need to access health care services and at a higher cost.⁶⁸ The longer a person lives, the more likely it is that he will require long-term care services.⁶⁹ The resource impact of an ageing population is illustrated by the United States budget. The projected total cost of the programs serving older persons (Medicaid, Medicare and Social Security) consumes 34 per cent of the fiscal year 2009 national budget.⁷⁰ With an older population expected to increase 107 per cent by the year 2050,⁷¹ the United States undoubtedly faces budget and programmatic challenges in the near future.

An ageing population need not negatively impact economic development. Older persons constitute a 'hidden resource' for nations.⁷² With appropriate policies, the experience and expertise of older persons can be 'a powerful basis for future development.'⁷³ The contributions of older persons may be the very answer to the costs of an older population.

Even a cursory look at the nexus between ageing and development illustrates the potential impact of older persons on future policy making. Those policies will be shaped by how older persons can contribute to society and what they need in return.

6. THE EXPERIENCE OF AGEING: CONTRIBUTIONS AND VULNERABILITIES

'...most policy makers continue to think of ageing primarily in humanitarian terms, with concern centered on pensions and care-giving, while ignoring its development implications and potential.'⁷⁴ Alexander Sidorenko

6.1 Introduction. Two focal points – contributions and vulnerabilities - frame how older age is experienced and how human rights are implicated. Older persons are often associated with images of weakness and need. Themes of participation and

⁶⁸ Canadian Special Senate Committee note 21 at chapter 4.

⁶⁹ The Economist note 58.

⁷⁰ United States Office of Management and Budget *Updated Summary Tables May 2009-Budget of the U.S. Government Fiscal Year 2010*; online: <http://www.whitehouse.gov/omb/budget/fy2010/assets/summary.pdf> (accessed 18 October 2009).

⁷¹ Kinsella note 5 at 13.

⁷² Vienna Plan note 2 at para 40.

⁷³ United Nations *Madrid International Plan of Action on Ageing* Report of the Second World Assembly on Ageing (2002) UN Doc A/CONF.197/9 annex II of Resolution 1 at article 10.

⁷⁴ Alexandre Sidorenko *International Action on Ageing: Where Do We Stand?* The WDA-HSG Discussion Paper Series on Demographic Issues No. 2007/4 at 15 (2007).

contribution play an increasingly important role in the ageing experience, however, and are vitally tied to development objectives.⁷⁵ The following sections touch on topics which impact the lives of older persons. Each of these topics are worthy of greater discussion than this essay allows. The intent herein is simply to acknowledge the major themes of ageing as identified in statistical data, policy and analysis. These topics will then be carried forward into an examination of current human rights documents and recommendations for enhancing the human rights framework.

To further encourage the idea of older persons as essential elements in global development and well-being, the contributions of older persons are examined first before moving to the vulnerabilities of older persons.

6.2 Contributions of Older Persons

Older persons contribute to their families, communities and nations. These contributions remain 'largely unrecognized and unsupported, however, and seldom is a positive link drawn between population ageing and development.'⁷⁶

Older men and women contribute to the economy. In all regions, older men are more likely than older women to be economically active, while older men in developing countries are more likely to be working than those in developed countries.⁷⁷ Older persons particularly continue to be economically active in developing countries where 'work' may consist of subsistence agricultural activity and retirement, with its accompanying lack of income, may not be a realistic option.⁷⁸ Developed countries have seen an increase in the number of older working women.⁷⁹ The economic activity of older women in developing countries is seldom captured in conventional data.⁸⁰

Older persons contribute to their families. In fact, older persons in developed nations are more apt to 'provide time, money and/or coresidence to their children'⁸¹ than to receive such benefits from their children. In developing countries, older persons

⁷⁵ Madrid Plan note 73.

⁷⁶ Monica Ferreira *Aging in Sub-Saharan Africa: Challenges for Governments and Older People* (2009) unpublished paper, on file with author.

⁷⁷ Kinsella note 5 at 103.

⁷⁸ Ibid.

⁷⁹ Kinsella note 5 at 106.

⁸⁰ Kinsella note 5 at 103.

⁸¹ Kinsella note 5 at 89.

contribute through household and socialization activities.⁸² In all regions, older persons serve as care givers for grandchildren, allowing their mothers to enter the work force.⁸³ In developing regions where HIV/AIDS is prevalent, older persons contribute 'most powerfully in their function as carers to younger generation kin affected by HIV/AIDS.'⁸⁴

The HIV/AIDS pandemic has wrought significant change in household structure:

Although the presence of many generations under one roof is not necessarily new, there are several distinctive characteristics in communities affected by HIV/AIDS. Often the middle generation - both men and women - is completely absent, leaving the old and young to support each other. Usually there are large numbers of orphans and vulnerable children living with grandparents or older people in a single household.⁸⁵

A study has shown that, in South Africa, this caregiver and parenting role falls primarily to grandmothers.⁸⁶

Older persons contribute locally and internationally through leadership, exemplified by the Council of Elders, an organization of world leaders 'who offer their collective influence and experience to support peace building, help address major causes of human suffering and promote the shared interests of humanity.'⁸⁷ Older persons participate in the transmission of culture and the education of future generations, providing 'a vast pool of social capital as knowledge bearers and educators.'⁸⁸

Tanzania's ageing policy, for example, acknowledges older persons to be a 'source of information, knowledge and experience....custodians of customs and traditions, advisers/mediators and child carers.'⁸⁹

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Isabella Aboderin and Monica Ferreira *Linking Ageing to Development Agendas in sub-Saharan Africa: Challenges and Approaches* (2008) World Demographic Association University of St. Gallen Discussion Paper No. 2008/1 at 5; online http://www.wdassociation.org/project/uploads/1/1_Isabela_Aboderin.pdf (accessed 27 October 2009).

⁸⁵ HelpAge International/International HIV/AIDS Alliance *Forgotten families-Older people as carers of orphans and vulnerable children* (2003) Policy Report at 6 (International HIV/AIDS Alliance – Brighton UK); online <http://www.helpage.org/Resources/Policyreports> (accessed 27 October 2009).

⁸⁶ Ferreira Study note 17.

⁸⁷ Council of Elders; online: www.theelders.org (accessed on 21 October 2009).

⁸⁸ HelpAge Forgotten Families note 85 at 4.

⁸⁹ United Republic of Tanzania *National Ageing Policy* (2003) Ministry of Labour, Youth Development and Sports at 3; online <http://www.globalaging.org/elderrights/world/2007/BGTanzania.pdf> (accessed 28 October 2009).

When the contributions of older persons outweigh care to older persons' needs, however, the 'dark side' of ageing emerges.⁹⁰ Particularly in less developed regions where the concept of retirement may not exist, the burdens of advancing age and poverty weave a destructive web. Older women are especially affected:

As main caregivers to large families in poor communities, and despite increasing age associated ill-health, the burden of caregiving and responsibility exhausts [older women] physically and emotionally and leaves them with little time and money to care for their own needs.⁹¹

The WHO has called for urgent action regarding the situation in Sub-Saharan Africa where 'older people (mostly women) absorb enormous additional burdens placed on the family by the HIV/AIDS pandemic.'⁹² Older persons have been forced to sell their assets to cover the medical, food and schooling costs of additional household members.⁹³

Despite the contributions which older persons make and the potential to further enhance those contributions, the hardships often faced by older persons hinder those efforts. The following sections examine the experiences of older persons which generate hardship and vulnerability.

6.3 Older Persons and Vulnerabilities

6.3.1 Introduction. There is no doubt that older age may bring struggle and hardship. Older persons are not vulnerable simply because of older age, however. Circumstances such as declining physical or mental health may leave older persons unable to care for their personal and financial well-being. Families may be ill-equipped or unavailable to serve the needs of their older members. Communities may lack the continuum of residential care options required by older persons. Health care systems may not appropriately accommodate geriatric patients. Older persons may experience income poverty resulting from forced or voluntary retirement, inability to work due to health issues or lack of pension and social security schemes. Incapacity and

⁹⁰ Monica Ferreira *The elderly woman: A double jeopardy* (2006) unpublished paper presented at International Longevity Center Global Alliance Symposium on Older Women in Pune India, 2006, on file with author.

⁹¹ Ibid.

⁹² World Health Organization *International Plan of Action on Ageing: report on implementation* Report by the Secretariat (2004) Executive Board EB115/29 at para 10; online http://apps.who.int/gb/ebwha/pdf_files/EB115/B115_29-en.pdf (accessed 28 October 2009).

⁹³ HelpAge Forgotten Families note 85 at 7.

dependence render older persons vulnerable to neglect, abuse and violence. Limited education may reduce an older person's awareness of rights and ability to access the law. Stereotypes often serve to strip older persons of their dignity, independence and decision-making opportunities.

These vulnerabilities can be exacerbated by migrant or refugee status, by emergencies or natural disasters, by rural isolation or by being female. Older persons in developing countries are particularly exposed to hardship.

The discussion below identifies some of the more prominent aspects of ageing which impact the human rights of older persons and impede their participation in development. While these topics are addressed separately, there can be no doubt of their interrelated relationship.

6.3.2. Poverty. Research concludes that older persons are 'particularly affected by chronic poverty.'⁹⁴ In all regions of the world, older persons experience income poverty.⁹⁵ Older persons in developing countries are 'more likely to be living on less than USD 1 per day than the population as a whole'⁹⁶ and are thus proportionally overrepresented in poverty statistics. In Europe, older persons face a greater risk of being poor than the general adult population.⁹⁷

Inadequate income at older ages can result from several factors including voluntary or forced retirement, lack of available employment, age discriminatory employment practices, inability to work for health reasons, lack of pension, and lack of social security grants.⁹⁸ Older persons who wish to be economically active may be prevented from doing so. Older persons unable to work may have no pension or other source of income.

⁹⁴ Chronic Poverty Research Centre *The Chronic Poverty Report 2008-09 Escaping Poverty Traps* (2009) at 6; online http://www.chronicpoverty.org/uploads/publication_files/CPR2_ReportFull.pdf (accessed 15 October 2009).

⁹⁵ This essay intentionally avoids comprehensively defining and analyzing poverty. For purposes of this discussion, poverty will be approached from an income perspective and generally refers to income which is inadequate to cover a person's basic needs.

⁹⁶ UN 2009 Follow-up note 53 at para 5.

⁹⁷ Asghar Zaidi *Poverty of Elderly People in EU25* (2006) Policy Brief - European Centre for Social Welfare Policy and Research at 4; online: http://www.monitoringris.org/documents/tools_reg/poverty-elderly.pdf (accessed 15 October 2009).

⁹⁸ Alexander Samorodov *Ageing and labour markets for older workers* (1999) Employment and Training Papers 33, International Labour Office Geneva.

Family situations impact an older person's poverty risk. A study in Africa found an increase in poverty amongst older persons 'when they become either principal breadwinners for the family, or have become caregivers for children.'⁹⁹

6.3.3 Health. The advance of age often brings physical and mental health issues: 'age-related diseases are profoundly influenced by basic biological changes that occur in our bodies as we grow older.'¹⁰⁰ With increasingly older populations, global health profiles will feature 'a greater incidence of chronic and degenerative diseases.'¹⁰¹

In developing countries, older persons often lack access to basic health care services not to mention services tailored to their needs.¹⁰² The ageing of the population has created a shortage of health care professionals trained in geriatrics and gerontology even in developed nations.¹⁰³ In the United States, for example, only 5 of the 125 medical schools have geriatric departments.¹⁰⁴

6.3.4 Care and residence. When older persons are incapacitated due to physical or cognitive decline, appropriate care and residential options become a priority. The primary location of care for older persons tends to differ between less developed regions and more developed regions. In developing countries, incapacitated older persons reside with kin as 'social traditions and official decrees of filial and familial responsibility have discouraged debate about living arrangements of older people.'¹⁰⁵ However, with fewer children being born, the loss of adult children to disease, migration of younger family members, increased education and employment of women, the family institution will strain to uphold its traditional care giving role.¹⁰⁶

⁹⁹United Nations Development Programme *Ageing and Poverty in Africa and the Role of Social Pensions* (2005) International Poverty Centre Working Paper number 8 at 13; online <http://www.undp-povertycentre.org/pub/IPCWorkingPaper8.pdf> (accessed 28 October 2009).

¹⁰⁰ International Longevity Center Global Alliance *Global Aging Report - Threats to Longevity, A Call to Action* (2009) International Longevity Center Global Alliance at 11.

¹⁰¹ Kinsella note 5 at 49.

¹⁰² Kollapen note 3 at 9.

¹⁰³ Canadian Special Senate Committee note 21 at section 4.3.

¹⁰⁴ Robert Butler 'United States of America' in *Global Aging Report – Threats to Longevity, A Call to Action* (2009) at 35 (International Longevity Center Global Alliance Ltd New York).

¹⁰⁵ Kinsella note 5 at 77.

¹⁰⁶ United Nations Division for the Advancement of Women *Gender Dimensions of Ageing Women* 2000 (2002) at 5; online <http://www.un.org/womenwatch/daw/public/ageing-final.pdf> (accessed 28 October 2009).

In developed countries, older persons are less reliant on family residence and more likely to live alone.¹⁰⁷ Institutionalized care for incapacitated older persons is more common in developed countries with larger aged populations.¹⁰⁸

Families and facilities provide not only essential care options for older persons but also play a leading role in the abuse of older persons.

6.3.5 Abuse. Older persons in poverty or with diminished physical or mental capacity become dependent on others for many aspects of their personal and financial affairs. This dependency leaves older persons particularly vulnerable to situations of neglect, abuse and violence at the hands of family members and others. The WHO has identified the abuse of older persons as an issue for urgent action.¹⁰⁹

The Toronto Declaration on the Global Prevention of Elder Abuse defines elder abuse as ‘a single or repeated act, or lack of appropriate action, within any relationship where there is an expectation of trust which causes harm or distress to an older person.’¹¹⁰ A WHO survey found that older persons perceive elder abuse as ‘neglect (isolation, abandonment and social exclusion), violation (of human, legal and medical rights) and deprivation (of choices, decisions, status, finances and respect).’¹¹¹ In developing regions, elder abuse may include ‘abandonment or desertion, loss of respect, systemic abuse, economic violence, scapegoating, social/domestic abuse, community violence, political violence and armed conflict, and HIV/AIDS related violence.’¹¹²

Elder abuse exists in all regions and most often the perpetrators are family members or caregivers.¹¹³ The prevalence of elder abuse is uncertain due to its broad definition,

¹⁰⁷ Kinsella note 5 at 71.

¹⁰⁸ Kinsella note 5 at 76.

¹⁰⁹ WHO Plan note 92 at para 11.

¹¹⁰ World Health Organization *Toronto Declaration on the Global Prevention of Elder Abuse* (2002); online www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf (accessed 28 October 2009).

¹¹¹ World Health Organization *Missing voices: view of older persons on elder abuse* (2002) WHO/NMH/VIP/02.1 at v; online http://www.who.int/ageing/projects/elder_abuse/missing_voices/en/index.html (accessed 28 October 2009).

¹¹² Monica Ferreira *Protecting older persons against violence, abuse and discrimination* Paper for seminar ‘Family Support Networks and Population Ageing’, Doha Qatar June 3-4 2009, on file with author.

¹¹³ Ibid.

lack of research and an estimated 80 per cent rate of underreporting.¹¹⁴ In the United Kingdom, however, 500,000 older persons are estimated to be experiencing elder abuse at any given time.¹¹⁵

6.3.6 Education and Literacy. Particularly in developing countries, older persons tend to be less educated and have significantly lower literacy rates than younger persons.¹¹⁶ In China, for example, the 2000 census revealed 66 percent of older women and 29 per cent of older men to be illiterate.¹¹⁷ The current global emphasis on education may ensure that older persons of the future will benefit from greater education.¹¹⁸ However, the existing older population and that for decades to come will be handicapped by illiteracy. With less education and literacy skills, older persons are less aware of their rights or how to access benefits. Illiteracy hinders an older person's ability to work, provide self-care, and contribute to development.¹¹⁹

6.3.7 Images and Attitudes on Ageing. Negative attitudes and perceptions create barriers to the participation of older persons in their own well-being and that of society. The term 'ageism' refers to 'a set of beliefs according to which the value and ability of individuals is judged based on their chronological age' and involves 'systematic stereotyping and discrimination' against older persons.¹²⁰ Older persons are often assumed to be incapable, with their lives holding less value.¹²¹ Research in the United States finds that older persons are viewed as 'physically and cognitively inept but socially sensitive....pitied but not respected.'¹²²

¹¹⁴ World Health Organization *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main Report* (WHO Geneva) (2008) at 1; online www.who.int/ageing/publication/ELDER_DocAugust08.pdf (accessed 28 October 2009).

¹¹⁵ Frances Butler *Rights for Real-Older People, Human Rights and the CEHR* (2006) AgeConcern at 35; online http://www.ageconcern.org.uk/AgeConcern/Documents/0406_Rights_for_Real_Report.pdf (accessed 28 October 2009).

¹¹⁶ Kinsella note 5 at 94.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid..

¹²⁰ United Nations Department of Economic and Social Affairs *Rights of Older Persons* Report of the Expert Group Meeting 5-7 May 2009 at 5; online www.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf (accessed 28 October 2009).

¹²¹ Butler note 115 at 34.

¹²² Amy J.C. Cuddy and Susan T. Fiske 'Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons' in *Ageism: Stereotyping and Prejudice Against Older Persons* ed. Todd D. Nelson, at 17 (Massachusetts Institute of Technology – US) (2002).

Mandatory retirement ages are a tangible example of ageism, as are any policies which discriminate against older employees.¹²³ Negative perceptions about older persons in the workplace leave older workers unable to find employment.¹²⁴

6.3.8 Exacerbations. The hardships of ageing can be further exacerbated by factors such as gender (see section 6.4), living in a rural area, or being a migrant, refugee or victim of a natural disaster. The extra impact of living in a developing region was established in the statistics and topics discussed above.

The world's population of older persons is concentrated in rural areas.¹²⁵ While this is especially true in developing countries¹²⁶ which hold the vast majority of the world's older population, it is similarly the case in developed nations such as the United States.¹²⁷ Rural older persons are more likely to experience poverty, illiteracy and lack of services and limited access to health care facilities.¹²⁸ Older persons in rural United States 'generally have less income, lower educational attainments, and a higher dependence on social security income...'.¹²⁹ In Africa, studies find that rural older persons are more likely to be poor.¹³⁰

The situation of older refugees can be 'particularly tragic'.¹³¹ Older refugees may lose family caregivers and be physically unable to flee situations of persecution.¹³² In refugee camps, older persons often lack appropriate health care and living quarters.¹³³

Migrants have historically been exploited and discriminated against and older migrants may be particularly affected.¹³⁴ The Council of Europe has noted the

¹²³ Canadian Special Senate Committee note 21 at 16.

¹²⁴ Jacques H. Schraven 'The Netherlands' in *Global Aging Report – Threats to Longevity, A Call to Action* (2009) International Longevity Center Global Alliance at pp 101-102..

¹²⁵ Kinsella note 5 at 29.

¹²⁶ Madrid Plan note 73 at para 5.

¹²⁷ United States Department of Agriculture *Rural Population and Migration: Trend 6 - Challenges From an Aging Population* Economic Research Service Briefing Rooms website; online <http://www.ers.usda.gov/Briefing/Population/Challenges.htm> (accessed 30 September 2009).

¹²⁸ UNDAW note 106 at 9.

¹²⁹ Ibid.

¹³⁰ UNDP note 99 at 16.

¹³¹ United Nations High Commissioner for Refugees *UNHCR's Policy on Older Refugees* (2000) EC/50/SC/CRP.13, Annex II at para 5; online <http://www.unhcr.org/refworld/docid/47036b502.html> (accessed 23 October 2009).

¹³² UNHCR (2007) note 14 at para 4.

¹³³ Ibid at paras 16, 17.

¹³⁴ African Union *African Common Position on Migration and Development* Executive Council EX.CL/277(IX) 2006 at sections 3.7 and 3.10.

'particular vulnerability of elderly migrants' and has recommended measures to facilitate their access to welfare, health care and pensions.¹³⁵

Older persons are disproportionately affected by natural disasters. After Hurricane Katrina in the United States, 75 per cent of bodies found were persons age 60 and older even though this age group comprised only 15 percent of the population in New Orleans at the time.¹³⁶ Older persons may be unable to escape disasters, may lose caregivers, and humanitarian assistance programs often focus on women and children.¹³⁷

6.4 The Special Situation of Older Women

'Discrimination against women in all areas of their lives throughout their lifespan has a severe and compounded impact on women in old age.'¹³⁸ CEDAW Committee

6.4.1 Introduction. Older women feature prominently in all statistics on the vulnerabilities of older persons. Calling attention to the issues of older women is neither being insensitive towards older men nor political game-playing in the gender arena. The special situation of older women is a matter of fact – not because of their age or their gender in isolation but because of the circumstances of their lives.

6.4.2 Poverty. Throughout the world, research confirms that older women are more likely to experience income poverty. From Europe¹³⁹ to Canada¹⁴⁰ and from the Arab world¹⁴¹ to the African continent,¹⁴² statistics reveal the feminization of poverty: 'a situation where the number of women in poverty is increasing at a much faster rate than for men, so that poor people are disproportionately female.'¹⁴³

¹³⁵ Council of Europe *The situation of elderly persons in Europe* Reply of the Committee of Ministers to Parliamentary Assembly Recommendation 1796 (2007) at CM/AS(2008)Rec/1796final at section 11.5; online <http://assembly.coe.int/Documents/Adopted/Text/tq07/EREC/796.htm> (accessed 28 October 2009).

¹³⁶ Robin Knowles and Betsy Garrison *Planning for Elderly in Natural Disasters* Disaster Recovery Journal Fall 2006 – Volume 19, Issue 4; online <http://www.drj.com/articles/fall06/1904.07.html> (accessed 21 October 2009).

¹³⁷ HelpAge International at <http://www.helpage.org/Emergencies/Background> (accessed 21 October 2009).

¹³⁸ Committee for International Convention on the Elimination of All Forms of Discrimination Against Women *Ending Discrimination against older women through the Convention, CEDAW* (2002) Decision 26/III. U.N. Doc A/57/38 (Part I), at para 431.

¹³⁹ Zaidi EU25 note 97 at 6.

¹⁴⁰ Monica Townson *A Report Card on Women and Poverty* The Canadian Centre for Policy Alternatives (2000) available at http://policyalternatives.ca/documents/National_Office_Pubs/women_poverty.pdf (accessed 30 September 2009).

¹⁴¹ United Nations Economic and Social Commission for Western Asia *The Arab Plan of Action on Ageing to the year 2012* (2002) U.N. Doc. E/ESCWA/SD/2002/WG.1/8.

¹⁴² Kollapen note 3 at 5.

Poverty in older women results from a number of factors not the least of which relates to women's work experiences. A World Bank report comments that

Women continue to have less work experience, earn lower wages, and have less pension coverage than men. They also tend to outlive their husbands by several years, which creates a common problem of low incomes for elderly women, poverty among very old women, and falling living standards for widows.¹⁴⁴

Older unmarried women are thus less likely than men to have access to a work-related pension.¹⁴⁵ Where women did participate in the workforce, their participation (and thus their pension) was often reduced due to family responsibilities.¹⁴⁶ The economic activity of women outside of the formal workforce is generally not credited by governmental social security programs.¹⁴⁷ Where older women wish to work, they are often encumbered by employer biases and mandatory retirement ages which are lower than men's.¹⁴⁸

Being unmarried or a widow, and thus without a spouse's financial support, increases an older woman's risk of poverty. In the United States, widows in rural areas have a poverty rate three times greater than widows in urban areas and constitute a majority of the rural older poor population.¹⁴⁹ In Canada, 49 percent of unmarried or widowed older women have low incomes.¹⁵⁰ In Europe, women age 75 and older have the highest risk of being poor.¹⁵¹ Rural India has a greater rate of 'widowed and destitute elderly women' as compared with urban areas.¹⁵² Older women in rural areas

¹⁴³ Ibid at 9.

¹⁴⁴ Holzmann note 63 at 31.

¹⁴⁵ CEDAW Committee Decision note 138 para 435.

¹⁴⁶ Kinsella note 5 at 113.

¹⁴⁷ Kinsella note 5 at 103.

¹⁴⁸ UN Expert Group note 120 at 4.

¹⁴⁹ Carolyn Rogers *Older Women and Poverty in Rural America* in *Amber Waves*, a publication of the United States Department of Agriculture Economic Research Service (2005); available at <http://www.ers.usda.gov/AmberWaves/September05/Findings/OlderWomen.htm> (accessed 30 September 2009).

¹⁵⁰ Townson note 140 at 9.

¹⁵¹ Zaidi EU25 note 97 at pp 6, 9.

¹⁵² R.A. Mashelkar 'India' in *Global Aging Report – Threats to Longevity, A Call to Action* International Longevity Center Global Alliance at 77.

of developing regions may be denied access to government benefits because they lack identity documents.¹⁵³

In all regions, older women are far more likely to be unmarried than are older men.¹⁵⁴ While 60 to 85 per cent of older men are married, only 30 to 40 per cent of older women are married.¹⁵⁵ At age 75, only 20 per cent of women are married as compared to 70 per cent of men.¹⁵⁶ These statistics vary because women live longer than men and older women are less likely to get remarried if widowed or divorced.¹⁵⁷

6.4.3 Health. Older women are likely to experience more limiting health issues than older men.¹⁵⁸ Comprising the vast majority of the oldest old population, women suffer from aged-related chronic health problems and disability.¹⁵⁹ The health problems of older women result from a culmination of factors in addition to age. Determinants of poor health include poverty, limited access to health care, inadequate access to food and water, and lower levels of education.¹⁶⁰ Women are more likely than men to be poor, to sacrifice their nutrition and health care for the sake of family, and to be illiterate – and thus more likely to develop health problems in older age.¹⁶¹

Residents of long term care facilities are disproportionately women.¹⁶² A recent conference devoted to the oldest old recommended that women over age 80 be designated a ‘preferred category’ for purposes of health care and support.¹⁶³

Older women are by no mean universally characterized by poor health. While the ‘paradox of older women experiencing better mortality but worst [sic] health status is a

¹⁵³ Committee on the Elimination of All Forms of Discrimination against Women *Concept note on the draft general recommendation on older women and protection of their rights* (2009) CEDAW/C/2009/II/WP.1/R at para 16.

¹⁵⁴ Kinsella note 5.

¹⁵⁵ Kinsella note 5 at 67.

¹⁵⁶ Ibid.

¹⁵⁷ Kinsella note 5 at 69.

¹⁵⁸ World Health Organization *Women, ageing and health* Fact Sheet No. 22 (June 2000); online <http://www.who.int/mediacentre/factsheets/fs252/en/print.html> (accessed 20 October 2009).

¹⁵⁹ Kinsella note 5 at 54.

¹⁶⁰ WHO Women note 158.

¹⁶¹ Ibid.

¹⁶² Kinsella note 5 at 76.

¹⁶³ The Centre for Gerontological Studies *International Colloquium on the Oldest Old (80+) With Focus on Health and Care Giving: Conclusions, Suggestions, Recommendations and Policy Implications* 9-11 February 2009; online: <http://www.globalaging.org/health/world/2009/the%oldest%20old.pdf> (accessed 7 October 2009).

common finding in many populations,¹⁶⁴ WHO emphasizes that most older women (and men) are relatively healthy.¹⁶⁵

6.4.4 Discrimination. Discrimination has historically infiltrated virtually every aspect of women's life spans, in health care, education, employment, and in law, policy and practice. This differential treatment of women persists.¹⁶⁶ As statistics show, older women especially are targets of discrimination 'based on deep-rooted cultural and social ties.'¹⁶⁷

In certain developing countries, a widow's risk of poverty increases when statutory or customary law limits her right to inheritance and land ownership.¹⁶⁸ The African Union has recognized this issue and called upon its members to review and revise discriminatory laws.¹⁶⁹ In countries where statutory retirement ages are lower for women than for men, women's pensions are often less.¹⁷⁰

6.4.5 Education. Older women tend to have high illiteracy rates.¹⁷¹ Especially in rural areas of developing regions, the illiteracy rates of older women can be double to triple that of older men.¹⁷²

6.4.6 Violence and abuse. Older women experience abuse and violence. WHO notes that certain groups are more vulnerable to elder abuse including 'the very old, those with limited functional capacity, women and the poor.'¹⁷³

Stereotypes about women contribute to their vulnerability. In developing countries where women are 'routinely perceived as vulnerable, weak and dependent,' older women are 'more susceptible to abuse.'¹⁷⁴

¹⁶⁴ John Knodel and Napaporn Chayovan *Population Ageing and the Well-Being of Older Persons in Thailand* Research Report 08-659 of the Population Studies Center of the University of Michigan (2005) at 52; online: <http://www.psc.isr.umich.edu/pubs/pdf/rr08-659.pdf> (accessed 27 October 2009).

¹⁶⁵ WHO Women note 158.

¹⁶⁶ United Nations *International Convention on the Elimination of All Forms of Discrimination against Women* UN Doc A/34/46 (1979), entered into force 3 September 1981, at Preamble.

¹⁶⁷ CEDAW Concept Note note 153 at para 8.

¹⁶⁸ World Bank *Engendering Development Through Gender Equality in Right, Resources and Voice A* World Bank Policy Research Report (2001) at pp 120 - 122.

¹⁶⁹ AU Policy note 20 at section 4.6.

¹⁷⁰ World Bank *Engendering Development* note 168 at 265.

¹⁷¹ CEDAW Concept Note note 153 at para 20.

¹⁷² Kinsella note 5 at 94.

¹⁷³ WHO Toronto Declaration note 110.

¹⁷⁴ Pan American Health Organization *Human Rights & Health – Older Persons* (2008) at 2; online http://www.paho.org/ENGLISH/DD/PUB/10069_OlderPersons.pdf (accessed 28 October 2009).

One particularly insidious form of elder abuse aimed primarily at women in certain regions is violence based on allegations of witchcraft. While older men are not excluded, research finds that older women are the main targets. HelpAge International, an organization devoted to ageing issues, estimates that 317 older women and 28 older men were victims of witchcraft killings in 9 districts in Tanzania between 1999 and 2003.¹⁷⁵ The murder of suspected witches is not limited to Tanzania¹⁷⁶ or the African continent and occurs in parts of South America and India.¹⁷⁷

Research has linked witchcraft killings to economic stress. A study in Tanzania which examined the relationship between income security and the murders of older women found that 'extreme rainfall leads to large income drops and a doubling of witch murders.'¹⁷⁸ The same study found parallels between the situation in Tanzania and the witch killings in Europe during the 16th – 18th centuries when there was 40,000 murders of mainly widowed, poor, elderly women.¹⁷⁹ That older women become convenient scapegoats and expendable household members illustrates their lack of status in society.

6.4.7 Widows. In all regions of the world, women are far more likely than men to be widowed.¹⁸⁰ The situation of older widows is of special concern: 'Across a wide spectrum of countries, religions and ethnic groups, upon the death of a husband a widow is often left destitute.'¹⁸¹ In some developing countries, widows are virtually unprotected in practice if not in law. Especially in Africa and Asia, widows are often denied rights to inheritance or property ownership and are subjected to property grabbing by relatives or chased away from their homes, beaten or killed in property disputes.¹⁸²

¹⁷⁵ HelpAge International *Statement on Recent Killings Related to Witchcraft Accusations in Kenya* on HelpAge website 16 July 2009; online: <http://www.helpage.org/News/Latestnewst/IYpZ> (accessed 28 October 2009).

¹⁷⁶ Notably, Tanzania's National Ageing Policy, note 89, denounces this practice at section 3.9.

¹⁷⁷ Edward Miguel *Poverty and Witch Killing* Review of Economic Studies (2005) 72, 1153-1172 at 1156.

¹⁷⁸ *Ibid* at 1170.

¹⁷⁹ Miguel note 177 at 1156.

¹⁸⁰ United Nations Division for the Advancement of Women *Widowhood: invisible women, secluded or excluded Women2000* (2001) at 2; online http://www.un.org/womenwatch/daw/public/wom_Dec%2001%20single%20pg.pdf (accessed 28 October 2009).

¹⁸¹ *Ibid* at 11.

¹⁸² UNDAW *Widowhood* note 180 at 14.

Older widows are vulnerable to poverty not only due to discriminatory inheritance and property laws or practices, but also as a result of employment discrimination, poor education, and mourning customs which prohibit employment.¹⁸³

In developed countries, older widows are more likely to live alone and in social isolation than do their male counterparts.¹⁸⁴ In developing countries, older widows are more apt to live with family¹⁸⁵ and thus, perhaps, making them particularly susceptible to abuse.

6.4.8 Conclusions. The experiences of women as they age are diverse and affected by a complex web of factors. Weave several of these factors together for any particular older woman and her special vulnerability becomes clear. An older man may be poor, illiterate, in poor health and just as vulnerable as an older woman. However, an older woman is statistically more likely - far more likely - to experience any or all of the vulnerability factors discussed above. The situation of older women has been documented by a variety of sources: the 2009 Expert Group convened by UNDESA,¹⁸⁶ the CEDAW Committee,¹⁸⁷ and the World Bank.¹⁸⁸ These sources confirm that the female gender factor exacerbates the difficulties of older age.

7. CONCLUDING REMARKS

There can be no doubt that as a population group, older persons are commanding increased world attention. The sheer force of their numbers will propel older persons and their experiences into the spotlight. Developed nations already face the impact of ageing populations. Developing nations cannot wait unprepared when projections place 79 per cent of the world's older population in their regions by the year 2050.

The contributions of older persons are opportunities to be eagerly grasped for the benefit of both economic and human development. However, the vulnerabilities of older persons, and especially older women, present barriers to those contributions and impact

¹⁸³ UN DAW Widowhood note 180 at 14,15.

¹⁸⁴ Kinsella note 5 at 71.

¹⁸⁵ Ibid.

¹⁸⁶ United Nations Expert Group note 120.

¹⁸⁷ CEDAW Concept Note note 153.

¹⁸⁸ World Bank Engendering Development note 168.

the human rights of older persons. As a World Bank report notes, '[t]he toll on human lives is a toll on development – since improving the quality of people's lives is development's ultimate goal.'¹⁸⁹

The human rights paradigm offers a way to understand and respond to the situations of older men and women. The following two sections of this essay examine the documents and policies of the international and regional human rights systems for their applicability to and focus on the experiences of older persons.

¹⁸⁹ World Bank Engendering Development note 168 at 10.

CHAPTER TWO

THE INTERNATIONAL HUMAN RIGHTS OF OLDER MEN AND WOMEN: An assessment of United Nations instruments and policies

1. INTRODUCTION

‘...it is symbolic that whilst most other disadvantaged and excluded groups...are legally “internationally recognized,” older people have been left behind.’¹⁹⁰

Israel Doron

The United Nations has enacted binding treaties aimed at the specific human rights of various population groups with the notable exception of older persons. Women, children, disabled persons, and migrants are among the population sectors bestowed with their own conventions. While not ignored by the UN system, older persons and older women in particular continue to reside ‘on the periphery of internationally agreed goals, frameworks and policy documents’.¹⁹¹

Existing UN treaties apply to older persons but in a generalized fashion. As discussed below, a few treaties do mention age or older persons within the context of their particular subject matter. Most major treaties, however, are silent on age and instead use the classification ‘or other status’ to capture any distinction not specifically listed. Regarding older women as a distinct category, existing treaties are silent except for one reference in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This lack of coordinated conceptualization renders older persons ‘invisible as a group within the law.’¹⁹²

UN instruments of a non-binding character, such as proclamations, comments and resolutions which constitute ‘soft law’, have increasingly filled the gap in developing and articulating the human rights norms applicable to older persons. Momentum is growing towards a more formal UN focus on older persons whether through a declaration, the appointment of a special rapporteur or a convention. Whether any future UN activity will adequately highlight the specific needs of older women remains to be seen. In the

¹⁹⁰ Israel Doron and Itai Apter *What difference would a new convention make to the lives of older people?* (2009) Background briefing paper for International Symposium on the Rights of Older People at section 3.3; online www.globalaging.org/elderrights/world/2008/newconvention.pdf (accessed on 28 October 2009).

¹⁹¹ United Nations Expert Group note 120 at 15.

¹⁹² Ibid.

meantime, the CEDAW Committee has commenced the drafting process for a general recommendation which will explore the rights of older women.

This chapter will canvass the current UN instruments and documents, binding and otherwise, for their general and specific applicability to older men and women. The degree to which this current framework sufficiently addresses the particular issues related to older persons will be examined in the final chapter of this essay.

2. REVIEW OF 'HARD LAW': BINDING UNITED NATIONS TREATIES

The 1948 Universal Declaration of Human Rights (UDHR)¹⁹³ stands as the foundational expression of international human rights. The UDHR serves as a cornerstone for subsequent human rights treaties. Espousing the values of freedom, equality and dignity, the UDHR pronounces that all persons may claim their rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' (emphasis added).¹⁹⁴ With this language we witness the birth of the 'or other status' category, appearing thereafter in virtually every human rights treaty which prohibits discrimination based on certain distinctions.

The UDHR establishes broad human rights applicable to all persons. Formulating the nuances of these rights as they pertain to specific population groups was left for later treaty making. However, older persons and widows find brief mention in the UDHR. Within the context of the right to social security, the UDHR mentions 'old age' and 'widowhood' as being two circumstances leading to 'lack of livelihood beyond [one's] control'.¹⁹⁵ The tendency to primarily associate older age and, especially, older women with vulnerability thus has auspicious lineage.¹⁹⁶

¹⁹³ United Nations *Universal Declaration of Human Rights* (1948) G.A. res. 217A(III), UN Doc A/810 at 71.

¹⁹⁴ Ibid at Article 2.

¹⁹⁵ UDHR note 193 at Article 25.1.

¹⁹⁶ See also: United Nations *Convention relating to the status of Refugees* 189 U.N.T.S. 150 (entered into force 22 April 1954) at Article 24.1(b) which obligates States to provide old age social security to legal refugees

Human rights for all persons were articulated more fully in two treaties which spring from the UDHR: the International Covenant on Civil and Political Rights (ICCPR)¹⁹⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁹⁸ Both treaties prohibit discrimination based on a number of categories including sex and other status.¹⁹⁹ The ICCPR grants to all persons, which inherently includes older persons, a variety of civil and political rights and freedoms, ranging from the rights to life, to privacy, and to vote, to freedoms of religion, expression and peaceful assembly.²⁰⁰ All rights are to be enjoyed equally between men and women, which is the extent of any specific mention of women.²⁰¹ The ICESCR similarly recognizes a range of rights, socioeconomic and cultural, for all persons and thus applicable to older persons. Of special pertinence to older persons are the ICESCR provisions relating to the right to work, the right to education, the right to an adequate standard of living, the right to the highest attainable standard of health, and the right to social security.²⁰² Women are specifically mentioned only within the contexts of marriage and childbearing.²⁰³

Due perhaps to the demographic clamor about global ageing, recent UN treaties have incorporated comments about age or older persons. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)²⁰⁴ applies to migrant workers and their families without distinction as to characteristics including age.²⁰⁵ Family members are defined as ‘dependent children and other dependent persons who are recognized as members of the family...’²⁰⁶ While older persons are not specifically mentioned, it thus appears that older migrants and their older family members are protected under this treaty.

¹⁹⁷ United Nations *International Covenant on Civil and Political Rights* (1966) G.A. res. 2200A(XXI), 21 U.N.GAOR Supp. (No. 16) at 52, UN Doc A/6316, 999 U.N.T.S. 302, entered into force 23 March 1976.

¹⁹⁸ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc A/6316, 999 U.N.T.S. 302, entered into force 3 January 1976.

¹⁹⁹ ICCPR note 197 at Article 2.1; ICECSR note 198 at Article 2.2.

²⁰⁰ ICCPR note 197.

²⁰¹ ICCPR note 197 at Article 3.

²⁰² ICESCR note 198.

²⁰³ Ibid.

²⁰⁴ United Nations *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) G.A. res.45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, UN Doc A/45/49, entered into force 1 July 2003.

²⁰⁵ Ibid at Articles 1.1 and 7.

²⁰⁶ ICRMW note 204 at Article 4.

The Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD)²⁰⁷ makes the greatest advances, as a binding treaty, towards distinguishing older persons as a population category. The CRPD points to the multiple forms of discrimination which disabled persons might face including on the basis of sex and age.²⁰⁸ Parties to the CRPD must ensure 'gender- and age-sensitive assistance and support for persons with disabilities... and their caregivers', along with protection services that are gender- and age-sensitive.²⁰⁹ Health services must be 'designed to minimize and prevent further disabilities, including among... older persons.'²¹⁰ In providing social protection, States parties must 'ensure access by persons with disabilities, in particular women... and older persons with disabilities.'²¹¹ Finally, disabled persons must have access to retirement benefits,²¹² an issue which affects older persons.

The CRPD thus touches on issues related to disabled older persons but declines to approach older persons as a distinct population of persons with disabilities. The CRPD does not examine age-related health issues of older women.

Even though CEDAW²¹³ predates the more recent publicity on ageing trends, its virtual silence on older women is remarkable. The issue of age is mentioned solely within the context of employment, specifically as to the right to social security for 'invalidity and old age and other incapacity to work.'²¹⁴

An examination of binding treaties creates an inaccurate impression that the human rights of older persons (and older women in particular) have been neglected by the UN. For more than 25 years, however, the UN system has developed an expanding body of analysis and policy recommendations directed at older persons and ageing issues. More recently, the specific human rights concerns of older women have found

²⁰⁷ United Nations *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (2006) G.A. res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, UN Doc A/61/49, entered into force 3 May 2008.

²⁰⁸ Ibid at Preamble (p).

²⁰⁹ CRPD note 207 at Article 16.2.

²¹⁰ CRPD note 207 at Article 25(b).

²¹¹ CRPD note 207 at Article 28.2(b).

²¹² CRPD note 207 at Article 28.2(e).

²¹³ CEDAW note 166.

²¹⁴ Ibid at Article 11.1(c).

enhanced status. The following section will trace the development of the UN's policy efforts on older persons in general and locate any focus on older women.

3. REVIEW OF 'SOFT LAW': NON-BINDING UNITED NATIONS POLICY

While the human rights issues of older persons drew sporadic prior attention,²¹⁵ the World Assembly on Ageing in 1982 and its Vienna Plan (VIPAA) start the concerted efforts to create a normative framework around older persons. A host of initiatives followed in the first World Assembly's wake and built upon that framework. A second World Assembly on Ageing in Madrid gathered the experience gained in the intervening 20 years and fashioned an extensive plan for the rights of older persons.²¹⁶

3.1 The Vienna Plan 1982 (VIPAA)

It is a 'biological fact that aging is a common and ineluctable process.'²¹⁷ Vienna Plan

Coordinated analysis of the human rights of older persons began with the UN's World Assembly on Aging in 1982. This assembly produced the Vienna International Plan of Action on Aging (VIPAA),²¹⁸ one of the objectives of which was to stimulate policies that provide for the security needs of 'the elderly' and their opportunities to contribute to development.²¹⁹ The VIPAA frames these two discourses as humanitarian issues and developmental issues.

Humanitarian issues address what older persons need in terms of health care, social welfare, income security, education, housing and family.²²⁰ The VIPAA asserts that '[a]lthough the elderly share many problems and needs with the rest of the population, certain issues reflect the specific characteristics and requirements of this group.'²²¹

Developmental issues pertain to the 'socio-economic implications of the ageing of the population...[those being] effects on...production, consumption, savings...and general social and economic policies'.²²² The VIPAA notes the impact of ageing in

²¹⁵ See e.g. G.A. res 213 (III)(1948), G.A. res. 2542 (XXIV)(1969) and G.A. res. 3137 (XXVIII)(1973)

²¹⁶ Madrid Plan note 73.

²¹⁷ Vienna Plan note 2 at para 27

²¹⁸ Vienna Plan note 2.

²¹⁹ Vienna Plan note 2 at para 3(c).

²²⁰ Vienna Plan note 2 at para 17.

²²¹ Ibid.

²²² Vienna Plan note 2 at para 18.

terms of changing ratios of younger workers to older non-workers, the changing nature of family support structures, the priority for rural development, and the need for flexible retirement options.²²³

Highlighting the concepts of coordination and interrelatedness, the VIPAA makes 50 recommendations for policy-making on ageing and additional recommendations concerning training, research and data collection.²²⁴ The policy recommendations cover health and nutrition, protection of elderly consumers, housing and the environment, family social welfare, income security and employment, and education.²²⁵

The VIPAA exhibits an awareness that enhancing the well-being of older persons serves also to enhance the ability of older persons to contribute to society, thus making humanitarian and developmental aging issues 'closely intertwined'.²²⁶

The VIPAA contains general guidelines and principles intended for adaption by individual countries according to respective cultures and financial capabilities. Emphasis is made, however, on 'basic considerations which reflect general and fundamental human values, independent of culture, religion, race or social status...'.²²⁷

The VIPAA briefly addresses the impact of ageing in developing countries. Developing countries are urged to develop policies now in order to avoid the ageing challenges currently being faced by developed countries.²²⁸ Rural development is regarded as essential to older persons,²²⁹ as well as acknowledgement of 'radical changes' in family structures which traditionally supported older persons.²³⁰

Older women, as a discrete group, find official recognition in the VIPAA. The VIPAA notes that aging policies must reflect the diverse nature of older persons, and singles out the particular 'severe disadvantage' of elderly women as requiring special attention.²³¹ Noting that women are projected to hold a majority percentage within the older population, governments are assigned 'a special responsibility to the most

²²³ Vienna Plan note 2.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid at para 31(f).

²²⁷ Vienna Plan note 2 at para 27.

²²⁸ Vienna Plan note 2 at para 71.

²²⁹ Vienna Plan note 2 at para 39.

²³⁰ Vienna Plan note 2 at para 35.

²³¹ Vienna Plan note 2 at para 89.

vulnerable among the elderly, particularly the poor, of whom many are women and from rural areas'.²³² With a longer life expectancy than men, the old age of women may be 'aggravated by economic need, isolation, and little or no prospects for paid employment',²³³ and governments are exhorted to ensure that social security systems provide for women.²³⁴

The VIPAA serves as the starting gun in the race being run by virtually all nations to manage the impact of ageing populations. The international human rights community has subsequently employed a variety of methods to deepen the normative analysis of the rights of older persons. Exploration of the concerns of older women has also advanced since the VIPAA but to a lesser degree.

Twenty years after the Vienna assembly, a second world assembly in Madrid injected fresh focus into analysis on older persons. Before reviewing the Madrid report (the MIPAA), however, the following section summarizes significant UN developments on older men and women which occurred between the two assemblies.

3.2 Developments between the VIPAA and MIPAA

After the VIPAA, activity at the UN initially consisted of follow-up reports which encouraged UN agencies and member nations to mainstream ageing issues. The following decade, however, produced expanded efforts to raise awareness of older persons' human rights. These efforts began with the 1991 United Nations Principles for Older Persons,²³⁵ which noted the diversity of older persons, the stereotypes which hinder older persons, the potential contributions of older persons and the needs of frail older persons.²³⁶ Five principles relating to the rights of older persons were proclaimed: independence, participation, care, self-fulfillment and dignity.²³⁷

Independence is encouraged by ensuring that older persons have access to necessities such as food, water, appropriate living situations and health care, and that

²³² Vienna Plan note 2 at paras 20(c), 25(m).

²³³ Vienna Plan note 2 at para 45.

²³⁴ Vienna Plan note 2 at para 72.

²³⁵ United Nations *United Nations Principles for Older Persons* (1991) G.A. res. 46/91, Annex, UN Doc A/RES/46/91.

²³⁶ Ibid.

²³⁷ Ibid.

older persons are provided with opportunities for education and for income generation.²³⁸

The participation of older persons must be fostered in policy formulation, in the sharing of older persons' knowledge, in the formation of associations and through service opportunities.²³⁹ Self-fulfillment similarly encourages access to and participation in opportunities for the educational, cultural, spiritual and recreational development of older persons' potential.²⁴⁰

The principles of care and dignity focus more on the needs of older persons. Care includes not only appropriate living situations for older persons but also health care, social and legal services which emphasize enhanced well-being, privacy and autonomy.²⁴¹ Dignity is enhanced through freedom from abuse and discrimination.²⁴²

The 1992 United Nations Proclamation on Ageing²⁴³ elegantly describes the global ageing trend as 'humanity's coming of age, which can be understood as a demographic phenomenon, but also as a social, economic and cultural one of great promise'.²⁴⁴ Intergenerational cooperation is urged, the contributions of older persons are welcomed, and nations are encouraged to support initiatives which view older persons as 'contributors to their society and not as a burden'.²⁴⁵ The Proclamation designated the year 1999 as the International Year of Older Persons.²⁴⁶

With broad principles having been established, the UN turned its focus to practical strategies to give effect to these principles. Global targets for the year 2001 were identified and adopted by the General Assembly.²⁴⁷ Conferences sponsored by the UN incorporated recommendations concerning older persons. The Programme of Action

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ United Nations *Proclamation on Ageing* (1992) UN Doc A/47/49.

²⁴⁴ Ibid at para 1(l).

²⁴⁵ UN Proclamation note 243 at para 2(d).

²⁴⁶ Ibid.

²⁴⁷ United Nations *Implementation of the International Plan of Action on Ageing: integration of older persons into development* (1992) G.A. res. 47/86, U.N. GAOR Supp. (No. 49) at 167, UN Doc A/47/49.

resulting from the Cairo International Conference on Population and Development²⁴⁸ noted the increasing numbers and proportions of older persons and encouraged nations to develop plans to promote both self-reliance of, and support for, older persons.²⁴⁹

The World Summit for Social Development produced the Copenhagen Declaration on Social Development²⁵⁰ which committed to, inter alia, improving the lives of older persons.²⁵¹ The countries participating in the World Summit agreed to a number of actions including several relevant to older persons: social protection for widows and older persons,²⁵² policies to encourage the contributions of all generations,²⁵³ lifelong learning,²⁵⁴ and removal of restrictions on women's rights to own and inherit property and to work.²⁵⁵ The Programme of Action²⁵⁶ produced by this World Summit emphasized the protection of older persons over the contributions of older persons. It encouraged stronger family support, access to social services, protection from abuse and violence, participation in policy making, and assistance to grandparents in care giving roles.²⁵⁷

During the twenty years between the two world assemblies, the CESCR Committee issued a number of General Comments which elaborate specific ICESCR rights. Many of these General Comments contain references to the rights of older persons. General Comment 4 on the right to adequate housing²⁵⁸ notes that the right to housing exists regardless of age and that accessibility must be a priority for such 'disadvantaged groups as the elderly'.²⁵⁹ General Comment 12 on the right to adequate

²⁴⁸ United Nations *Programme of Action of the International Conference on Population and Development* International Conference on Population and Development U.N. Doc. A/CONF.171/13 (1994) available online at: <http://www.un.org/popin/icpd/conference/offeng/poa.html> (accessed on 30 September 2009).

²⁴⁹ Ibid at paras 6.16 - 6.20.

²⁵⁰ United Nations *Copenhagen Declaration on Social Development* World Summit for Social Development (1995) UN Doc A/CONF.166/9 res.1 Annex I.

²⁵¹ Ibid at paras 26.o., 26.q.

²⁵² UN Copenhagen note 250 at Commitment 2.d.

²⁵³ UN Copenhagen note 250 at Commitment 4.h.

²⁵⁴ UN Copenhagen note 250 at Commitment 6.b.

²⁵⁵ UN Copenhagen note 250 at Commitment 5.e.

²⁵⁶ United Nations *Programme of Action of the World Summit for Social Development* (1995) World Summit for Social Development A/CONF.166/9 res.1 Annex II; online at: http://www.un.org/esa/socdev/wssd/pgme_action.html (accessed on 28 October 2009)

²⁵⁷ Ibid at para 40.

²⁵⁸ Committee for International Covenant on Economic, Social and Cultural Rights *General Comment 4 The right to adequate housing (Article 11(1) of the Covenant)* (1991) E/1992/23.

²⁵⁹ Ibid at para 8(e).

food²⁶⁰ prohibits discrimination on the basis of age in access to food and speaks of physical accessibility for all persons including 'physically vulnerable individuals, such as...elderly people.'²⁶¹

General Comment 13 on the right to education²⁶² emphasizes that this right 'is not limited by age or gender'.²⁶³ General Comment 14 on the right to the highest attainable standard of health²⁶⁴ establishes as a core obligation the non-discriminatory physical and economic accessibility for vulnerable and disadvantaged groups such as older persons.²⁶⁵ Regarding the quality of health care for older persons, the Comment speaks of integrating all types of treatment - preventive, curative and rehabilitative - and notes the attention needed to chronically and terminally ill older persons.²⁶⁶

Whereas these Comments targeted specific ICESCR rights, General Comment 6 encompassed the entire spectrum of ICESCR rights as they particularly affect older persons.²⁶⁷ Calling the growing ageing population a 'quiet revolution',²⁶⁸ General Comment 6 explains the omission of explicit reference to older persons in such documents as the UDHR and the ICESCR as a function of 'demographic ageing...not [being] as evident or as pressing as it is now'.²⁶⁹

General Comment 6 applies the rights described in the ICESCR to the distinct needs of older persons and focuses on the fact that they 'feature prominently among the most vulnerable, marginal and unprotected groups'.²⁷⁰ General Comment 6 discusses the equal rights of older men and women, rights relating to work, the right to social security, protection of the family, the right to an adequate standard of living, the right to

²⁶⁰ Committee for International Covenant on Economic, Social and Cultural Rights (1999) *General Comment No. 12 The right to adequate food (Article 11)* E/C.12/1999/5.

²⁶¹ Ibid at para 13.

²⁶² Committee for International Covenant on Economic, Social and Cultural Rights *General Comment No. 13 The right to education* (1999) UN Doc E/C.12/1999/10.

²⁶³ Ibid at para 24.

²⁶⁴ Committee for International Covenant on Economic, Social and Cultural Rights *General Comment No. 14 The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000) E/C.12/2000/4.

²⁶⁵ Ibid.

²⁶⁶ Ibid at para 25.

²⁶⁷ CESCR Committee GC 6 note 24.

²⁶⁸ Ibid at para 2.

²⁶⁹ CESCR Committee GC 6 note 24 at para 11.

²⁷⁰ CESCR Committee GC 6 note 24 at para 17.

physical and mental health, and the right to education and culture.²⁷¹ This Comment contributes little original analysis on the human rights of older persons, however, instead drawing heavily on the VIPAA recommendations and the 1991 Principles.

3.3 Developments between the VIPAA and MIPAA - Older Women

During the twenty years between the VIPAA and the MIPAA, the rights and issues of older women received limited elucidation. The 1985 Nairobi Forward-Looking Strategies²⁷² contained a section on 'elderly women' which emphasized the circumstances contributing to older women's vulnerability: their unpaid work at home and low chances of paid employment which then restricted later access to pensions, longer life expectancy and isolation, and their economic need in general.²⁷³ Governments were urged to find ways of employing elderly women, along with developing strategies on health care and housing aimed at enabling older women.²⁷⁴

A 1990 UN General Assembly resolution pertaining to the VIPAA emphasized 'the positive contributions and specific roles of elderly women' within the context of development.²⁷⁵ The 1991 Principles,²⁷⁶ discussed above, made no express mention of older women. The 1992 Proclamation on Aging, above, urges national policies which 'respond to the special characteristics, needs and abilities of older women' and which provide older women with 'adequate support for their largely unrecognized contributions to the economy and well-being of society'.²⁷⁷

The 1994 Cairo Programme, above, mentioned the special vulnerability of older women to discrimination and violence²⁷⁸ as well as their needs for health care and social security.²⁷⁹ The 1995 Copenhagen Programme, above, addressed equal access

²⁷¹ CESCR Committee GC 6 note 24.

²⁷² United Nations *Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000* (1985) World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace UN Doc A/CONF.116/28/Rev.

²⁷³ Ibid at para 286.

²⁷⁴ Ibid.

²⁷⁵ United Nations *Implementation of the International Plan of Action on Ageing and related activities* (1990) A/RES/45/106.

²⁷⁶ UN Principles note 235.

²⁷⁷ UN Proclamation note 243 at paras 2(g), 2(h).

²⁷⁸ Cairo note 248 at para 6.20.

²⁷⁹ Cairo note 248 at para 6.17(b).

for women of all ages to social services and noted the need for support of older women.²⁸⁰

The 1995 Fourth World Conference on Women produced the Beijing Declaration and Platform for Action,²⁸¹ recommending, inter alia, programs for poverty alleviation directed at older women and for the specific health care needs of older women.²⁸²

Governments were encouraged to strengthen support to older women caring for adult children with HIV/AIDS and their orphaned survivors.²⁸³ This care giving role of women and the elderly, and its impact, is noted in the UN's Declaration on HIV/AIDS.²⁸⁴

Surprisingly, the ICESCR Committee's 1995 General Comment 6 on the rights of older persons, discussed above, says nothing explicitly about older women. The CEDAW Committee issues General Recommendations on specified topics similar to the ICESCR Committee's General Comments. General Recommendation 24 on women and health²⁸⁵ urges access of older women to health care services that 'address the handicaps and disabilities associated with ageing',²⁸⁶ and includes older women within 'vulnerable and disadvantaged groups'.²⁸⁷

All of the United Nations documents and resolutions between 1982 and 2002 built upon the VIPAA and provided a deeper and broader focus on the issues of older persons, thus setting the stage for the Second World Assembly on Ageing in Madrid.

3.4 The Madrid Plan 2002 (MIPAA)

When ageing is embraced as an achievement, the reliance on human skills, experiences and resources of the higher age groups is naturally recognized as an asset in the growth of mature, fully integrated, humane societies.²⁸⁸

Madrid Political Declaration

²⁸⁰ Copenhagen note 256 at paras 35(c), 38(j).

²⁸¹ United Nations *Beijing Declaration and Platform for Action* (1995) Fourth World Conference on Women A/CONF.177/20/Add.1.

²⁸² Ibid at paras 60(a) and 106.

²⁸³ Beijing note 281 at para 108(g).

²⁸⁴ United Nations *Declaration of Commitment on HIV/AIDS* at para 68 (2001); online at http://unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf (accessed on 24 October 2009).

²⁸⁵ Committee for International Covenant on the Elimination of All Forms of Discrimination against Women *General Recommendation No. 24 Article 12: Women and health* (1999) A/54/38/Rev.1.

²⁸⁶ Ibid at para 24.

²⁸⁷ CEDAW Committee Gen Rec 24 note 285 at para 6.

²⁸⁸ United Nations *Political Declaration Report of the Second World Assembly on Ageing* (2002) A/CONF.197/9 annex I of Resolution at Article 6.

The Second World Assembly on Ageing benefitted from twenty years of maturation of the VIPAA's analysis. The resulting report, the Madrid International Plan of Action on Ageing (MIPAA),²⁸⁹ reframed ageing themes and broadened the scope concerning both older women and ageing issues in developing countries. Eleven central themes were condensed into three priority directions elaborated into a structure of 18 Issues, 35 Objectives, and 238 Actions.²⁹⁰

The eleven central themes of the MIPAA include the eradication of poverty, the empowerment and self-fulfillment of older persons through opportunities to participate and learn, the elimination of age discrimination and violence against older persons, a commitment to gender equality and to the unique situation of indigenous older persons, recognition of intergenerational interdependence, and the provision of health care and social services to older persons.²⁹¹ Additional themes emphasize research and partnerships in giving practical effect to the MIPAA.²⁹²

The MIPAA transformed the VIPAA's headings of 'humanitarian issues' and 'developmental issues' into priority directions: older persons and development; advancing health and well-being into old age; and ensuring enabling and supportive environments for older persons.²⁹³

'Older persons and development,' as the MIPAA's first priority direction, includes employment for all those older persons who wish to work; reduction of poverty among older persons; income security through pensions or social security programs; education; participation; improvement of rural infrastructure and conditions of rural dwellers, in general; intergenerational reciprocity; and issues of migrants and of older persons caught in emergency situations.²⁹⁴

'Advancing health and well-being into old age,' as the MIPAA's second priority direction, includes universal and nondiscriminatory access to health care, development of a continuum of physical and mental health care services to prevent health issues which arise with older age and to comprehensively address existing health concerns,

²⁸⁹ Madrid Plan note 73.

²⁹⁰ Ibid - not counting research, monitoring and governmental actions in follow-up implementation.

²⁹¹ Ibid at para 12.

²⁹² Ibid.

²⁹³ Madrid Plan note 73 at para 14.

²⁹⁴ Madrid Plan note 73.

access to adequate nutrition, training and support for older persons with HIV/AIDS or who are caring for family members with HIV/AIDS, and geriatric training for health care professionals.²⁹⁵

‘Ensuring enabling and supportive environments,’ as the third priority direction for the MIPAA, covers housing options for older persons, transportation, support services for caregivers including support of caregivers, elimination of violence, abuse and neglect affecting older persons, and enhancing the public image of older persons.²⁹⁶

The MIPAA calls for implementation to be guided upon ‘a political, economic, ethical and spiritual vision for social development of older persons’ based upon values ranging from human rights to peace and respect.²⁹⁷ Articulating issues, values and policy objectives is one thing. Translating those issues, values and policy objectives into effective national priorities and policy is the complicated step especially for developing countries without sufficient resources. The following section examines the MIPAA’s consideration of older persons in developing countries.

3.4.1 The MIPAA and Developing Countries

The MIPAA opens with a Political Declaration emphasizing the integrated nature of human rights and economic development:

Unless the benefits of social and economic development are extended to all countries, a growing number of people, particularly older persons in all countries and even entire regions, will remain marginalized from the global economy.²⁹⁸

The MIPAA seems to see global aging trends and the human rights of older persons less as matters of independent worth for developing countries and more as a means to the goal of ‘seeking full participation in the global economy of all developing countries.’²⁹⁹

The issues and recommended actions delineated in the MIPAA apply to all countries but less developed and more developed countries possess unique variations. The MIPAA notes that older persons in developing countries are more likely to lack

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Madrid Plan note 723at para 115.

²⁹⁸ United Nations Madrid Political Declaration note 288 at Article 7.

²⁹⁹ Ibid.

functional literacy and numeracy, thus making education and training available for older persons of particular importance.³⁰⁰ As older persons are more likely to work in the informal economy, developing countries are encouraged to 'extend employability...and vocational rehabilitation' to older workers.³⁰¹

As developing countries experience urban migration, older persons are often left without family support systems and thus the MIPAA encourages the incorporation of an aging perspective into agricultural and other rural programs.³⁰² Inclusion in public housing programs is essential for older persons in urban areas.³⁰³ For developing countries with significant HIV/AIDS infection rates, the MIPAA calls for policies to strengthen support to older persons caring for their ill children and orphaned grandchildren.³⁰⁴

The MIPAA notes that, for policy formulation purposes, developing countries need comprehensive age- and gender-specific research on ageing.³⁰⁵ International banks and funding institutions are encouraged to 'examine and adjust their lending and grants practices to ensure that older persons are recognized as a development resource' for developing countries. The MIPAA reiterates that 'developing countries face the challenge of simultaneous development and population ageing'.³⁰⁶

3.4.2 The MIPAA and Older Women

'Recognizing the differential impact of ageing on women and men is integral to ensuring full equality between men and women.'³⁰⁷ Madrid Plan

The contributions and issues of older women receive increased appreciation within the MIPAA and are woven into the priority directions, issues and action recommendations. Within the first priority direction - older persons and development - the MIPAA acknowledges the contributions of older women to their families and communities, encourages the participation of older women in decision-making and in the labor force, addresses the particular issues of older women in rural areas, and

³⁰⁰ Madrid Plan note 73 at para 36.

³⁰¹ Madrid Plan note 73 at para 24.

³⁰² Madrid Plan note 73 at para 29.

³⁰³ Madrid Plan note 73 at para 98(e).

³⁰⁴ Madrid Plan note 73 at para 101.

³⁰⁵ Madrid Plan note 73 at para 129.

³⁰⁶ Madrid Plan note 73 at para 4.

³⁰⁷ Madrid Plan note 73 at para 8.

focuses on the feminization of poverty.³⁰⁸ Undoubtedly, all of these themes are interrelated as they factor into poverty. Inequalities in work opportunities and in access to land and credit, traditional practices, rural isolation, family obligations and unremunerated work, and lack of social safety nets are issues separately and within the complex formula which creates the feminization of poverty.³⁰⁹

The MIPAA's second priority direction - health and well-being - acknowledges that the social, economic, physical and psychological well-being of older women is threatened by the 'cumulative effect' of a lifetime of obstacles.³¹⁰ Because women generally live longer, older women face increased risk of disability and disease.³¹¹

The third priority direction - enabling and supportive environments - covers abuse and neglect of older women, laws and practices which impact women's poverty, negative stereotypes on older women, and the effect on older women of their caregiving roles including that of caring for children infected with HIV/AIDS and grandchildren orphaned by HIV/AIDS.³¹²

The MIPAA exhibits deeper awareness of both the particular vulnerabilities of older women and the need to acknowledge and encourage the contributions of older women.

3.5 Since the MIPAA

The MIPAA provided renewed stimulus and focus on older persons and ageing. Since the MIPAA, the CESCR Committee has issued General Comments which exhibit an increasing awareness of older persons' issues. General Comment 15 on the right to water³¹³ prohibits discrimination on grounds including age.³¹⁴ States parties must protect the vulnerable and marginalized members of society and ensure they have

³⁰⁸ Madrid Plan note 73.

³⁰⁹ Ibid.

³¹⁰ Madrid Plan note 73 at para 64.

³¹¹ Madrid Plan note 73 at para 87.

³¹² Madrid Plan note 73.

³¹³ Committee for International Covenant on Economic, Social and Cultural Rights *General Comment No. 15 The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (2003) UN Doc E/C.12/2002/11.

³¹⁴ Ibid at para 13.

physical and economic access to water.³¹⁵ General Comment 18 on the right to work³¹⁶ prohibits age discrimination which limits access to employment.³¹⁷

General Comment 19³¹⁸ addresses the right to social security and its relation to the realization of other human rights. The right to social security provides access to governmental benefits during circumstances, such as sickness, unemployment or old age, which interfere with a person's ability to adequately provide for one's self or dependents.³¹⁹ Social security schemes must be available, adequate and accessible.³²⁰ This Comment remarks specifically on the importance of survivors' benefits 'particularly when endemic diseases, such as HIV/AIDS, tuberculosis and malaria, leave large numbers of children and older persons without...support.'³²¹

The CESCR Committee addressed the vague 'other status' category of nondiscrimination in General Comment 20.³²² Noting the evolving and contextual nature of discrimination, the Committee says the 'other status' category applies to 'social groups that are vulnerable and...suffer marginalisation.'³²³ This General Comment recognizes age as such a category in situations of employment, training, poverty and access to pensions.³²⁴

A 2007 United Nations ageing conference for Latin America and the Caribbean produced the Brasilia Declaration³²⁵ which highlights a number of issues but focuses

³¹⁵ ICESCR Committee GC 15 note 313 at paras 12,16,37.

³¹⁶ Committee for International Covenant on Economic, Social and Cultural Rights *General Comment 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2006) UN Doc E/C.12/GC/18.

³¹⁷ Ibid at para 33.

³¹⁸ Committee for International Covenant on Economic, Social and Cultural Rights *General Comment No. 19 The right to social security (art. 9)* (2008) UN Doc E/C.12/19.

³¹⁹ Ibid at para 2.

³²⁰ Ibid.

³²¹ ICESCR Committee GC 19 note 318 at para 21.

³²² Committee for International Covenant on Economic, Social and Cultural Rights *General Comment No. 20 Nondiscrimination in Economic, Social and Cultural Rights (art 2, para 2)* (2009) UN Doc E/C.12/GC/20.

³²³ Ibid at para 27.

³²⁴ ICESCR Committee GC 20 note 322 at para 29.

³²⁵ United Nations *Brasilia Declaration* Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean: towards a society for all ages and rights-based protection (2007); online http://www.un.org/esa/socdev/ageing/documents/regional-review/Declaracion_Brasilia.pdf (accessed 28 October 2009).

primarily on the vulnerabilities of older person. Significantly, the Brasilia Declaration promotes the drafting of a United Nations' convention on the rights of older persons.³²⁶

The UN MIPAA follow-up report for 2008³²⁷ suggests alternative approaches to ageing issues based upon a country's rate of ageing. Nations with a rapidly ageing population may wish to prioritize active and healthy ageing, while nations with a slower ageing population might approach ageing as a development and poverty concern.³²⁸ Countries with a moderately ageing population might focus on creating legal frameworks to protect older persons and ensure their participation in decision making.³²⁹

A group of independent experts met recently to provide the UN with a report on the rights of older persons. Specifically, this group's objective was 'to explore how fundamental human rights of older persons could be assured and deepened'.³³⁰ What distinguishes this gathering and its resulting report is its particular focus on a legal, human rights approach rather than a mixed development/human rights approach. The report reviews the situation of older persons within various nations and contains numerous recommendations, many of which are legal or quasi-legal in nature.³³¹

The expert group surveyed the existing international rights of older persons and found both normative and implementation gaps which result in law that is 'deficient and fails to act where people are disadvantaged and/or their dignity is undermined or infringed'.³³² Ultimately the expert group encouraged nations to support the appointment of a special rapporteur on the rights of older persons and the drafting of a convention on the rights of older persons.³³³

The Secretary-General's 2009 MIPAA follow-up report³³⁴ continues the themes of the expert group's report:

³²⁶ Ibid at para 26.

³²⁷ United Nations *Follow-up to the Second World Assembly on Ageing* Report of the Secretary-General (2008) A/63/95; online <http://www.un.org/esa/socdev/un-reports.html> (accessed 28 October 2009).

³²⁸ Ibid at paras 48 and 50.

³²⁹ UN 2008 Follow-up note 327 at para 49.

³³⁰ UN Expert Group note 120.

³³¹ Ibid.

³³² UN Expert Group note 120 at para 14.

³³³ UN Expert Group note 120 at para 20.

³³⁴ UN 2009 Follow-up note 53.

...despite the existence of various instruments and undertakings, older persons continue to face barriers in their participation as equal members of society as well as violations of their human rights in all parts of the world...³³⁵

The Secretary-General encouraged UN member nations to consider strengthening the human rights of older persons through new instruments such as were recommended by the expert group.³³⁶

3.5.1 Older Women since the MIPAA

Attention to the human rights of older women and the female aspect of the global ageing phenomenon remains nascent but common themes are emerging.

The CESCR Committee issued General Comment 16 on the equal rights of men and women³³⁷ which notes the multiple bases of discrimination faced by women, including age,³³⁸ and reminds States parties to provide women with 'equal rights to marital property and inheritance upon their husband's deaths'.³³⁹

The report of the 2009 UN expert group queries whether 'the special vulnerability of older women has been adequately captured'³⁴⁰ by existing human rights documents. Noting attacks based upon witchcraft accusations, the report recognizes that discrimination against older women can reach dangerous levels when fueled by negative stereotypes which encourage violence against older women.³⁴¹ Older women in rural areas and in developing countries are often illiterate and face lower national retirement ages than do men.³⁴² The report finds that, despite these obstacles, older women contribute through their care giving roles and participation in the informal economy.³⁴³ While the report describes issues faced particularly by older women, it contains no recommendations for action aimed specifically at older women.

³³⁵ Ibid at para 21.

³³⁶ UN 2009 Follow-up note 53 at para 68(e).

³³⁷ Committee for International Covenant on Economic, Social and Cultural Rights *General Comment No 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) U.N. Doc. E/C.12/2005/3.

³³⁸ Ibid at para 5.

³³⁹ CESCR Committee GC 16 note 337 at para 27.

³⁴⁰ UN Expert Group note 120 at para 6.

³⁴¹ UN Expert Group note 120 at para 1.

³⁴² UN Expert Group note 120 at paras 3,4.

³⁴³ UN Expert Group note 120 at para 3.

The UN's 2009 MIPAA follow-up report acknowledges the challenges brought by the 'feminization of ageing'³⁴⁴ and points to older women's special risk for abuse.³⁴⁵ Interestingly, however, this report is silent on the contributions of older women. Two issues are highlighted in the recommendations: the integration of a gender perspective into ageing policies and the need to reverse negative images of ageing.³⁴⁶

The CEDAW Committee has awakened to the need to prioritize the human rights of older women. While the MIPAA was yet being formulated, the Committee issued a decision on discrimination against older women.³⁴⁷ This decision notes the 'severe and compounded impact'³⁴⁸ on older women of lifetimes of discrimination. The CEDAW Committee calls generally for measures addressing poverty, older women's access to health care, education and literacy, pensions and the elimination of negative stereotypes.³⁴⁹ The contributions of older women, currently and throughout their lives, are given recognition.³⁵⁰

A recent Concept Note³⁵¹ anticipates and lays the groundwork for a future CEDAW general recommendation on the human rights of older women. The Committee finds that the rights of older women 'are not systematically addressed' and thus 'invisible'.³⁵² The lack of data disaggregated by sex and age contributes to this invisibility and to a lack of policy vision.³⁵³ The Concept Note acknowledges that women experience older age differently than men do based upon years of 'deep-rooted cultural and social'³⁵⁴ discrimination:

The impact of gender inequalities throughout their lifespans is obviously reflected in old age and often results in unfair resource allocation, maltreatment, abuse, gender-based violence and prevention of access to basic services. Older women often face discrimination in the workplace, around ownership of and access to land as a result of discriminatory inheritance law and practices...[and are] deprived of full inclusion and

³⁴⁴ UN 2009 Follow-up note 53 at para 4.

³⁴⁵ UN 2009 Follow-up note 53 at para 34.

³⁴⁶ UN 2009 Follow-up note 53 at para 68(c).

³⁴⁷ CEDAW Committee Decision note 138.

³⁴⁸ Ibid at para 431.

³⁴⁹ CEDAW Committee Decision note 138.

³⁵⁰ Ibid at para 436.

³⁵¹ CEDAW Concept Note note 153.

³⁵² Ibid at para 13.

³⁵³ CEDAW Concept Note note 153 at para 11.

³⁵⁴ CEDAW Concept Note note 153 at para 8.

participation in social, economic, cultural and political affairs.³⁵⁵

The Concept Note offers a number of recommendations, including: review of laws and practices which are age and sex discriminatory; promotion of the contributions of older women; increased access to adult education and literacy programs; creation of opportunities for older women's participation in society; development of health care policies; and collection of statistics on the situation of older women.³⁵⁶ Older women who are minorities or migrants, who live in rural or conflict areas, or who are unmarried all require special support and programs.³⁵⁷

The latest word on older women from the UN comes in a resolution on rural women.³⁵⁸ Encouragingly, older rural women receive special and separate attention. Their contributions are recognized and nations are urged to ensure access of older women to resources to address their needs and facilitate their empowerment.³⁵⁹

4. CHAPTER CONCLUDING REMARKS

The UN has slowly fostered a climate which recognizes the particular human rights concerns of older persons. However, the approach of the UN remains uneven as exemplified by the failure of the Millennium Declaration³⁶⁰ to mention issues related to ageing. Nevertheless, as the body of soft law on the rights of older persons builds critical mass, so will the momentum for stronger mechanisms to give this soft law a backbone.

The human rights of older women have generally been treated as a peripheral concern. While older women are benefitting from increased focus, their rights and concerns await committed international mobilization.

³⁵⁵ Ibid.

³⁵⁶ CEDAW Concept Note note 153.

³⁵⁷ Ibid at para 24.

³⁵⁸ United Nations *Improvement of the situation of women in rural areas* A/C.3/64/L.19 14 October 2009; online at <http://daccessdds.un.org/doc/UNDOC/LTD/N09/559/46/PDF/N0955946.pdf?OpenElement> (accessed on 23 October 2009).

³⁵⁹ Ibid.

³⁶⁰ United Nations *Millennium Declaration* (2000) G.A. Res.55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, UN Doc 4/55/49.

CHAPTER THREE

THE REGIONAL HUMAN RIGHTS OF OLDER PERSONS MEN AND WOMEN: An assessment of the African system, the European system, the Inter-American system and Arab human rights

1. INTRODUCTION

The international human rights system has spawned several regionally-organized human rights systems with their own treaties, policies and monitoring mechanisms. It is important to remember that significant segments of the global population, such as Asia, are not covered by any regional system but instead operate under the UN system³⁶¹ and national law. Africa, Europe and the Americas have organized and active regional systems while Arab expressions of human rights comprise less of a 'system' and more a skeletal initiative.

This chapter is not intended to examine the regional human rights system in as much detail as the previous chapter did with the international human rights system. Rather, this chapter scans the basic documents within these regional systems for their engagement with the human rights of older men and women. This chapter finds that consideration accorded to older persons varies between the regional systems. While older persons are implicitly covered by the rights articulated throughout these regional documents, older persons, and older women especially, benefit from sparse attention.

2. THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM

'In western society, the important role of elders has been lost and they are often seen as a burden on society, a drain on the country's fiscus. In Africa, elders are respected and trusted, as mediators, facilitators and repositories of knowledge and wisdom.'³⁶²

Dr. Jean Swanson-Jacobs

The African Union (AU), established in 2002 to replace the Organization of African Unity (OAU), drives Africa's regional human rights structure. The Southern Africa

³⁶¹ See, e.g., United Nations *Guidelines on the Implementation of the Macao Plan of Action on Ageing for Asia and the Pacific* (2000) United Nations Economic and Social Commission for Asia and the Pacific E/ESCAP/1174; online <http://www.unescap.org/56/E1174e.htm> (accessed 28 October 2009).

³⁶² Dr. Jean Swanson-Jacobs, South Africa Deputy Minister of Social Development, Address at the celebration of International Human Rights Day for Older Persons 10 December 2007; online: <http://www.info.gov.za/speeches/2007/07121016151006.htm> (accessed on 27 October 2009).

Development Community (SADC), a sub-regional development organization, also incorporates human rights elements within its policy. While many of the African regional documents use language closely resembling that of the UN, human rights concepts unique to African culture, such as the imposition of duties on individual persons, have contributed a distinctive flavor. However, despite the sentiments expressed above on Africa's devotion to its elders, African human rights documents have, for most purposes, failed to translate this devotion into practice.

The OAU's Cultural Charter for Africa, 1976,³⁶³ asserts and encourages African culture and identity but misses the opportunity to acknowledge the role of older persons in the transmission of culture. While the Charter stresses the need for participation by youth in cultural development,³⁶⁴ the Charter is silent on older persons and makes no mention of gender. However, the AU's most recent cultural charter,³⁶⁵ still waiting ratification, does note the cultural role of 'elders and traditional leaders' as deserving recognition and integration.³⁶⁶

In 1981 the OAU adopted the African Charter on Human and Peoples' Rights³⁶⁷ which looks to 'historical tradition and the values of African civilization'³⁶⁸ to inspire human rights. The Charter's listing of protected categories for nondiscrimination include sex and 'or other status', but not age.³⁶⁹ Within the context of protecting the family, the 'aged' are entitled to special measures.³⁷⁰ Within the context of duties which the Charter establishes for individuals, each person must 'respect his parents at all time, to maintain them in case of need.'³⁷¹ Charters aimed at children³⁷² and

³⁶³ Organisation of African Unity *Cultural Charter for Africa* (1976); online http://www.africa-union.org/root/au/Documents/Treaties/Text/Cultural_Charter_for_Africa.pdf (accessed 28 October 2009).

³⁶⁴ Ibid at Chapter III.

³⁶⁵ African Union *Charter for African Cultural Renaissance* (2006); online http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20-%20Africa20%20Cultural%20Renaissance_EN.pdf (accessed 28 October 2009).

³⁶⁶ Ibid at Article 14.

³⁶⁷ Organisation of African Unity (now African Union) *African [Banjul] Charter on Human and Peoples' Rights* OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) adopted 27 June 1981, entered into force 21 October 1986.

³⁶⁸ Ibid at Preamble.

³⁶⁹ Banjul Charter note 367 at Article 2.

³⁷⁰ Banjul Charter note 367 at Article 18.

³⁷¹ Banjul Charter note 367 at Article 29.

³⁷² Organisation of African Unity (now African Union) *African Charter on the Rights and Welfare of the Child* OAU Doc. CAB/LEG/24.9/49(1990), entered into force 29 November 1999

youth³⁷³ similarly hold young people responsible for respecting and assisting their elders in time of need.³⁷⁴

The African Charter for Popular Participation in Development and Transformation, 1990,³⁷⁵ aims to increase the role of individuals in development. This Charter emphasizes the contributions of women to development³⁷⁶ and encourages efforts to integrate disabled persons,³⁷⁷ but contains no reference to older persons.

As in the UN, the rights of older persons in the African regional system are more fully articulated in policy documents than in binding documents. In 2002 the AU developed a Policy Framework and Plan of Action on Ageing³⁷⁸ which, like the MIPAA (but which actually predates the MIPAA), provides a comprehensive outline of recommendations and action items. The AU ageing policy encourages governments to enact their own policies and legislation on ageing and serves as a blueprint for action.

Thirteen ageing themes are identified by the AU ageing policy including discrimination, poverty, health, food, housing, family, social welfare, employment, emergencies, migration, education, gender, and research.³⁷⁹ The themes are divided into 13 recommendations and 184 action items. Issues of older persons that are particularly intrinsic to Africa are identified, including violence based on witchcraft accusations,³⁸⁰ traditional medicine,³⁸¹ retention of traditional respect for older persons,³⁸² social security programs which accommodate employment in the informal sector,³⁸³ and support mechanisms for older persons caring for adult children with HIV/AIDS and orphaned grandchildren.³⁸⁴

³⁷³ African Union *African Youth Charter* (2006) entered into force 8 August 2009; online http://www.africa-union.org/root/au/Documents/Treaties/Text/African_Youth_Charter.pdf (accessed 28 October 2009).

³⁷⁴ OAU African Charter Child note 371 at Article 31; AU Youth Charter note 372 at Article 26(c).

³⁷⁵ Organization of African Unity (now African Union) *African Charter for Popular Participation in Development and Transformation* (1990) distributed by the United Nations as A/45/427 of 22 August 1990.

³⁷⁶ *Ibid* at, for example, para 12.

³⁷⁷ African Charter Popular Participation note 375 at para 23.B.

³⁷⁸ AU Ageing Policy note 20.

³⁷⁹ *Ibid*.

³⁸⁰ *Ibid* at Recommendation 4.1 and Recommendation I.b).

³⁸¹ AU Ageing Policy note 20 at 4.4 Recommendation II.j).

³⁸² AU Ageing Policy note 20 at 4.8 Recommendation I.b).

³⁸³ AU Ageing Policy note 20 at 4.9 Recommendation II.b).

³⁸⁴ AU Ageing Policy note 20 at 4.10 Recommendation III.i).

Although the human rights of older persons in general lack elaboration in binding documents, the human rights of older women are targeted in the AU's Protocol on the rights of women.³⁸⁵ The Protocol requires States Parties to protect 'elderly women,' with oblique reference to 'specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training.'³⁸⁶ States Parties must ensure that elderly women are treated with dignity and are free from violence and age discrimination.³⁸⁷ Relevant to all women and certainly to older women are the Protocol provisions on the rights of widows. Widows must not suffer 'inhuman, humiliating or degrading treatment'³⁸⁸ and must have the right to inherit an equitable share of the husband's property including the right to continue residing in the family home.³⁸⁹

The AU's ageing policy incorporates a number of references to gender in general and to older women specifically. It encourages gender disaggregated research³⁹⁰ and laws which provide older women with equitable rights pertaining to property ownership, inheritance, social security and credit.³⁹¹

Within the SADC's development agenda, older workers are entitled to retirement resources or social assistance.³⁹² An older person who continues to work is entitled to do so under non-discriminatory terms.³⁹³ The SADC's Protocol on Gender and Development³⁹⁴ strives for 'the empowerment of women,' and to 'harmonise the implementation' of the various human rights instruments and 'address emerging gender issues and concerns.'³⁹⁵ This Protocol encourages measures which grant women the

³⁸⁵ African Union *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2000) CAB/LEG/66.6 entered into force 25 November 2005.

³⁸⁶ Ibid at Article 22.

³⁸⁷ Ibid.

³⁸⁸ AU Protocol note 385 at Article 20(a).

³⁸⁹ AU Protocol note 385 at Article 21.1.

³⁹⁰ AU Ageing Policy note 20 at 4.2 Recommendation II and 4.4 Recommendation II.a).

³⁹¹ AU Ageing Policy note 20 at 4.1 Recommendation I.f), 4.5 Recommendation III.b) and f), 4.6 Recommendation I.c) and 4.9 Recommendation II.h).

³⁹² Southern Africa Development Community *Charter of Fundamental Social Rights in SADC* (2003) at Article 8(a) and (b).;online: <http://www.sadc.int> (accessed on 28 October 2009).

³⁹³ Ibid at Article 8(c).

³⁹⁴ Southern Africa Development Community *Protocol on Gender and Development* (2008); online: <http://sadc.int> (accessed 28 October 2009).

³⁹⁵ Ibid at Article 3(a), (b), (c).

ability to hold title to property and to inherit.³⁹⁶ States Parties must protect widows from violence, discrimination and humiliating treatment, give widows inheritance rights and, significantly, give widows 'access to employment and other opportunities' so that they may contribute to society.³⁹⁷ Within these latter provisions which appear to take cognizance of issues faced especially by widows is the requirement that widowers share the same rights.³⁹⁸ The statistics show that widowers do not generally face the hardships that widows face, however.

Without specifically referring to older women, the SADC's Gender Protocol addresses other matters relevant to older women. States Parties must adopt measures to 'ease the burden of the multiple roles played by women,'³⁹⁹ address norms and practices which lead to gender based violence,⁴⁰⁰ and recognize and support the care giving role of women in relation to HIV/AIDS.⁴⁰¹

As described in Chapter One, older persons on the African continent experience a particularly complicated set of issues related to human rights and development. Despite these issues, or perhaps because of them, the African human rights system has made the greatest efforts amongst regional systems towards protecting the rights of older persons. Nevertheless, as will be argued in Chapter Four, older persons and older women in Africa remain vulnerable without enhanced focus - which may be forthcoming. The African Commission on Human and Peoples' Rights has established an expert working group to examine the human rights of older persons, with an eye towards drafting a protocol on ageing.⁴⁰²

³⁹⁶ SADC Protocol note 394 at Article 7(b).

³⁹⁷ SADC Protocol note 394 at Article 10.1.

³⁹⁸ SADC Protocol note 394 at Article 10.2.

³⁹⁹ SADC Protocol note 394 at Article 16.

⁴⁰⁰ SADC Protocol note 394 at Article 21.1.

⁴⁰¹ SADC Protocol note 394 at Article 27.3.

⁴⁰² African Commission on Human and Peoples' Rights *Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa* ACHPHR/Res/43(XXXXV)09 (2009).

3. THE EUROPEAN REGIONAL HUMAN RIGHTS SYSTEM

The European regional human rights system, encompassing the Council of Europe (COE), the Commonwealth of Independent States (CIS), and the European Union (EU), has failed to coordinate attention on the human rights of older persons despite the rapidly ageing population of Europe. Older women are absent in any of the official regional human rights documents.

The COE's 1953 Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁰³ prohibited discrimination but, like the UDHR, used the 'or other status' classification to cover non-specified distinctions such as age.⁴⁰⁴ Older persons were not specifically addressed in any manner in the Convention or in its Protocol No. 12⁴⁰⁵, a general prohibition on discrimination which also fails to include age in its list of protected categories.⁴⁰⁶

In 1961 the COE adopted the European Social Charter⁴⁰⁷ which omits not only age within its non-discrimination categories but also, remarkably, the 'or other status' to cover unspecified categories. The Social Charter makes provision for the rights to social security⁴⁰⁸ and to social and medical assistance,⁴⁰⁹ but makes no reference to age or older persons within the context of these rights. The 1972 European Convention on Social Security addresses various forms of social security including 'old-age benefits'.⁴¹⁰ The Council's revised European Social Charter, 1999⁴¹¹ similarly ensures the non-discriminatory enjoyment of all Charter rights without mentioning age as a protected

⁴⁰³ Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) 213 U.N.T.S 222 adopted 4 November 1950, entry into force 3 September 1953.

⁴⁰⁴ Ibid at Article 14.

⁴⁰⁵ Council of Europe *Protocol No. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms* (2000) ETS No. 177 4.XI.2000; online <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm> (accessed 10 October 2009).

⁴⁰⁶ Ibid at Article 1.1.

⁴⁰⁷ Council of Europe *European Social Charter* (1961) ETS No. 035 18.X.1961; <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm> (accessed 10 October 2009).

⁴⁰⁸ Ibid at Article 12.

⁴⁰⁹ COE Social Charter note 407 at Article 13.

⁴¹⁰ Council of Europe *European Convention on Social Security* (1972) Paris, 14.XII.1972; online <http://conventions.coe.int/treaty/en/Treaties/Html/078.htm> (accessed 18 October 2009).

⁴¹¹ *European Social Charter (revised)* (1996) ETS No 163 entry into force 7 January 1999; online <http://www1.umn.edu/humanrts/euro/ets163.htm> (accessed 28 October 2009).

category although age would likely fall within the 'or other status' language.⁴¹² The failure of the revised Charter to protect age discrimination is surprising given that social protection for the elderly is amongst the list of the revised Charter's policy objectives⁴¹³ and that Article 23 emphasizes participation by the elderly, information for the elderly, and independence and autonomy in living and health care decisions.⁴¹⁴

The CIS adopted its 'Minsk Convention'⁴¹⁵ on human rights, which similarly grants the right to social security on the grounds of age⁴¹⁶ but fails to mention age as a prohibited ground for discrimination.⁴¹⁷

The Commission of the European Communities addresses older persons in its employment-focused Community Charter of the Fundamental Social Rights of Workers.⁴¹⁸ 'Elderly persons' are entitled to a decent standard of living upon retirement and if they have no means of support, then their respective nations are responsible for some form of social assistance.⁴¹⁹

The EU's Charter of Fundamental Rights⁴²⁰ breaks the silence and includes age within its categories protected against discrimination.⁴²¹ The Charter not only recognizes the right to social protection in old age⁴²² but also 'respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.'⁴²³ The EU Council issued a Directive⁴²⁴ addressing particular categories of employment discrimination, including age, which were generally prohibited but might be

⁴¹² Ibid at Article E.

⁴¹³ EU Social Charter note 411 at Part I. para 23.

⁴¹⁴ EU Social Charter note 411 at Article 3.

⁴¹⁵ Commonwealth of Independent States *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (Minsk Convention)* (1995); online: <http://refworld/docid/49997ae32c.html> (accessed 28 October 2009).

⁴¹⁶ Ibid at Article 16.

⁴¹⁷ Minsk Convention note 415 at Article 20.

⁴¹⁸ Commission of the European Communities *Community Charter of the Fundamental Social Rights of Workers* Office for Official Publications of the European Communities, Luxembourg, ISBN 920826-0975-8, 1990.

⁴¹⁹ Ibid at paras 24 and 25.

⁴²⁰ European Union *Charter of Fundamental Rights of the European Union* (2000/C 364/01) 18.12.2000 Official Journal of the European Communities C 364/1.

⁴²¹ Ibid at Article 21.1.

⁴²² EU Charter note 420 at Article 34.

⁴²³ EU Charter note 420 at Article 25.

⁴²⁴ Council of the European Union *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* L 303/16 Official Journal of the European Communities 2.12.2000.

permissible if 'objectively and reasonably justified by a legitimate aim...and if the means of achieving that aim are appropriate and necessary.'⁴²⁵

The European Commission has initiated a project focusing on the reintegration of socially excluded older persons such as older women in poverty, older persons with disabilities and those needing care and support.⁴²⁶

It may be that the European regional system has not focused on older persons as a policy priority because a number of the more developed nations have generated their own policies and laws. Countries such as Spain and Portugal, for example, constitutionally guarantee social and economic rights of older persons.⁴²⁷

4. THE INTER-AMERICAN REGIONAL HUMAN RIGHTS SYSTEM

'The theme of human rights for [Latin America's] population is becoming more and more visible, although there are still some who see the poverty and exclusion of older people as a "natural condition" and do not analyse it from a rights perspective.'⁴²⁸

Luz Barretto

Older persons are emerging as a human rights priority within the Inter-American human rights system. While regional rights guaranteed for all persons generally would apply to older persons, there has been no official focus on older persons until very recently. While yet in the fledgling stage, efforts are reportedly underway towards a regional convention on the rights of older persons.⁴²⁹ This section examines existing documents and their applicability for older persons.

The 1948 American Declaration of the Rights and Duties of Man⁴³⁰ establishes rights and duties held by all persons without distinction based upon various categories. Age is

⁴²⁵ Ibid at Article 6.1.

⁴²⁶ European Commission *Regional Action Plans - Guidelines for Action* (2007); online: http://www.i2i-project.net/pdfs/Guidelines_en.pdf (accessed 5 October 2009).

⁴²⁷ Spanish Constitution 1978 Article 50; online: <http://senado.es/constituicion/indices/constitucion.pdf> (accessed 28 October 2009); Constitution of Portugal 1976 Article 72; online: <http://www.servat.unibe.ch/icl/po00000.html> (accessed 28 October 2009).

⁴²⁸ Luz Barretto *A Report on the Status of Older People's Rights in Latin America* Background Briefing Paper for the International Symposium on the Rights of Older People at 12 (2009); online: <http://222.globalaging.org/elderrights/world/2009/rights/latinamerica.pdf> (accessed 28 October 2009).

⁴²⁹ Communication dated 14 October 2009 from Susanne Paul, Global Action on Aging, who attended a meeting in Chile on October 5-6 which focused on preparing for a regional convention for older persons.

⁴³⁰ *American Declaration of the Rights and Duties of Man* O.A.S. Res. XXX adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, DEA/Serv.L.V/II.82 doc.6 rev. 1 at 17 (1992).

not included as a distinction but presumably would be covered by the 'any other factor' category.⁴³¹ Old age is mentioned within the provisions describing the right to social security in circumstances preventing a person from earning a living.⁴³² Children have a duty to 'aid, support and protect'⁴³³ their parents, which would be applicable to older parents.

The 1951 Charter of the Organization of American States (OAS)⁴³⁴ aspired to a 'just social order'⁴³⁵ for all persons without distinction. The enumeration of distinctions did not include age but closed with '...or other social condition.'⁴³⁶ The right to a 'decent standard of living' was, however, ensured to workers and to those in 'old age' or who otherwise were unable to work.⁴³⁷

Age and older persons were unaddressed in the 1978 American Convention on Human Rights.⁴³⁸ Its 1988 Additional Protocol ('Protocol of San Salvador')⁴³⁹ forbids discrimination but age is not listed as a protected category, presumably falling under the distinction of 'other social condition.'⁴⁴⁰ The Protocol of San Salvador establishes the right to social security which, upon the beneficiary's death, must pass to the recipient's dependents.⁴⁴¹ Article 17 addresses protection of the elderly, specifically providing for those in care facilities, providing work programs for the elderly, and establishing social organizations for the elderly.⁴⁴²

⁴³¹ Ibid at Article II.

⁴³² American Declaration note 428 at Article XVI.

⁴³³ American Declaration note 428 at Article XXX.

⁴³⁴ *Charter of the Organization of American States* 119 U.N.T.S., entered into force December 13, 1951 available online at <http://www1.umn.edu/humanrts/iachr/oascharter.html> (accessed on 28 October 2009).

⁴³⁵ Ibid at Article 45.

⁴³⁶ Ibid at Article 45.a).

⁴³⁷ Ibid at Article 45.b).

⁴³⁸ Organization of American States *American Convention on Human Rights* O.A.S. Treaty Series No 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Serv.L.V/II.82 doc.6 rev.1 at 25 (1992).

⁴³⁹ Organization of American States *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"* O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999.

⁴⁴⁰ Ibid at Article 3.

⁴⁴¹ Protocol of San Salvador note 439 at Article 9.1.

⁴⁴² Protocol of San Salvador note 439 at Article 17.

OAS conventions directed at discrimination against disabled persons⁴⁴³ and eradicating violence against women⁴⁴⁴ contain no reference to age, older persons or older women. The Brasilia Declaration, discussed in Chapter Two, contains a significant push for the rights of older person but resulted from a UN sponsored ageing conference in Latin America rather than from the OAS.

While a number of individual Latin American and South American nations provide protection for the human rights of older persons within their constitutions,⁴⁴⁵ the Inter-American regional human rights system lacks official recognition of older persons and older women. If current efforts find success, then older persons within the Inter-American system may find themselves the recipients of the first human rights convention dedicated to their concerns.

5. ARAB HUMAN RIGHTS

Human rights find unique articulation within the Arab system although with little particular notice of older persons. The Universal Islamic Declaration of Human Rights⁴⁴⁶ prohibits discrimination on the basis of enumerated categories including sex, but not age or any sort of catch-all category.⁴⁴⁷ The right to social security is granted for those who cannot care for themselves without any expansion on the circumstances such as older age which could create the need for social security.⁴⁴⁸ Older persons are specifically mentioned within discussion of family rights, with parents being 'entitled to material support as well as care and protection from their children.'⁴⁴⁹ As might pertain

⁴⁴³ Organization of American States *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities* adopted 1999, entered into force 2001; online: <http://www.cidh.oas.org/Basicos/English/Basic15.Disabilities.htm> (accessed 29 October 2009).

⁴⁴⁴ Organization of American States *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belem do Para)* 33 I.L.M. adopted 1994, entered into force 1995; online: <http://www.cidh.org/women/convention.htm> (accessed 29 October 2009).

⁴⁴⁵ See, e.g., Constitution of the Bolivarian Republic of Venezuela 1999 at Article 80; online: http://www.analitica.com/bitlioteca/venezuela/constitucion_ingles.pdf (accessed 28 October 2009).

⁴⁴⁶ Islamic Council of Europe *Universal Islamic Declaration of Human Rights* adopted 19 September 1981/21 Dhul Qaidah 1401; online: http://www1.umn.edu/humanrts/instree/islamic_declaration_HR.html (accessed 28 October 2009).

⁴⁴⁷ Ibid at III.

⁴⁴⁸ ICE Declaration note 446 at XVIII.

⁴⁴⁹ ICE Declaration note 446 at XIX.

to older women, every married woman is granted the right to inherit from her husband.⁴⁵⁰

The Cairo Declaration on Human Rights in Islam, 1990,⁴⁵¹ is intended to provide human rights guidance and asserts equality without discrimination based on several categories including sex and 'or other considerations'.⁴⁵² Older men and women are mentioned specifically only in the context of armed conflict where, as 'non-belligerents' they are protected from being killed.⁴⁵³

The League of Arab States drafted an Arab Charter on Human Rights, 1994,⁴⁵⁴ which establishes both civil/political and socio-economic human rights applicable to all persons. The nondiscrimination clause contains no reference to distinctions based on age and lacks a 'or other status' category.⁴⁵⁵ State parties must, however, 'provide outstanding care and special protection for the family, mothers, children and the aged'.⁴⁵⁶ This 1994 Charter was never ratified, however. A redraft produced the 2004 Arab Charter on Human Rights⁴⁵⁷ which again refers to older persons solely within the context of family protection.⁴⁵⁸ Special mention is made, however, of prohibiting all forms of family violence,⁴⁵⁹ while the right to social security⁴⁶⁰ is ensured and the right to work without discrimination on grounds which include both sex and 'any other situation' is established.⁴⁶¹ This Charter was ratified in 2008.

It is not the purpose of this essay to examine or question the sincerity of the human rights documents produced by the League of Arab States but rather to review the initiatives of any regional effort, no matter how fledgling or controversial, as to the human rights of older persons and older women.

⁴⁵⁰ ICE Declaration note 446 at XX.

⁴⁵¹ *Cairo Declaration on Human Rights in Islam* (1990) U.N. GAOR, World Conf. on Human Rights, 4th Sess. Agenda Item 5, UN Doc A/CONF.157/PC/62/Add.18 (1993).

⁴⁵² Ibid at Article 1(9).

⁴⁵³ Cairo Declaration note 451 at Article 3(a).

⁴⁵⁴ Council of the League of Arab States *Arab Charter on Human Rights* (1994) reprinted in 18 Human Rights Law Journal 151 (1997).

⁴⁵⁵ Ibid at Article 2.

⁴⁵⁶ Arab Charter (1994) note 454 at Article 38(b).

⁴⁵⁷ League of Arab States *Arab Charter on Human Rights* adopted 2004, entered into force 15 March 2008 reprinted in 12 International Human Rights Report 893 (2005).

⁴⁵⁸ Ibid at Article 33.2.

⁴⁵⁹ Ibid.

⁴⁶⁰ Arab Charter (2005) note 457 at Article 36.

⁴⁶¹ Arab Charter (2005) note 457 at Article 34.

6. CHAPTER CONCLUDING REMARKS

The regional human rights systems are not blind to the concerns of older persons. Older people living within each of these regions experience concerns that are both universal to all older persons and unique to their region. Each of these regions possesses development and cultural variations which are reflected within their human rights documents. There is no dispute that older persons share in the rights and protections granted to all persons within regional human rights law. The debate surrounds the adequacy of these general rights and protections when applied to older persons. Some individual nations find the political will and the resources to boost their policies on older persons, but the lack of consistency from state to state reveals that full regional commitment is lacking.

Older women find even less regional human rights priority. Whether this low priority is a byproduct of cultural attitudes, the low public profile of older women, or the subsuming of older women within older persons generally, the rights and concerns of older women remain a crucial missing piece of the human rights puzzle.

With both the African and Inter-American systems starting efforts towards regional mechanisms for older persons, the regional systems may pave the way for an international convention.

CHAPTER FOUR

THE HUMAN RIGHTS OF OLDER PERSONS COMING OF AGE: Calling for a UN convention for older men and women

1. INTRODUCTION

‘...the time may have come for the UN to adopt a comprehensive
international convention on the rights and dignity of older persons...’.
Sergei Zelenev⁴⁶²

Calls for a UN convention on the human rights of older persons are ringing forth from all sectors - from the UN,⁴⁶³ regional units of the UN,⁴⁶⁴ non-governmental organizations devoted to ageing issues,⁴⁶⁵ and ageing experts.⁴⁶⁶ This final chapter analyzes the experiences of older persons against the existing UN and regional human rights frameworks pertaining to older person and concurs with the experts: the current human rights structure fails to adequately protect older persons.

A convention is not the only tool which could sharpen the UN's human rights focus on older persons. A special rapporteur could be appointed or a declaration could be adopted to provide focus on older persons. Neither of these mechanisms is explored in this essay, however. While these options are not without their benefits, they lack the teeth of a binding convention. The enforceability bite of conventions may well be dull but it still holds attention-grabbing potential. A convention *and* a special rapporteur might, in fact, provide the right combination of fixed and fluid focus on the rights of older persons.

This chapter argues in support of a convention for older persons notwithstanding debate about the efficacy and proliferation of conventions.⁴⁶⁷ This chapter explores some of those rights which the evidence supports giving priority to in a convention. Finally, but not of least importance, this chapter makes recommendations regarding how a convention should handle older women's rights, substantively and structurally.

⁴⁶² Zelenev note 19 at 614.

⁴⁶³ Ibid.

⁴⁶⁴ Brasilia Declaration note 325 at 4.

⁴⁶⁵ Bridget Sleep *Why it's time for a convention on the rights of older people* HelpAge International Position Paper (2009); online: <http://www.helpage.org/Resources/PolicyReports> (accessed 28 October 2009).

⁴⁶⁶ UN Expert Group note 120.

⁴⁶⁷ See, e.g. Oona A. Hathaway *Do Human Rights Treaties Make a Difference?* 111 Yale Law Journal 1935-2042 (2002).

What are the human rights of older persons? The UDHR, ICCPR and ICESCR establish bedrock human rights such as those to dignity, life, equality, work, an adequate standard of living, and education. These basic rights are translated more specifically based upon who they are applied to, whether it be children, persons with disabilities, or migrants. Older persons hold this same portfolio of basic human rights. Policy such as the MIPAA has explored these basic rights. In what circumstances, for example, does the right to dignity impact an older person? Which situations implicate the right to an adequate standard of living for older persons? How does discrimination pervade the lives of older persons? While it may seem obvious that basic human rights apply to older persons, these rights hold little value if not interpreted through the experiences of older persons.

There is no doubt that UN and regional efforts have made significant strides in fleshing out the human rights framework applicable to older persons. Yet statistics show that vast numbers of older persons live marginalized lives. Compared to other population groups, older persons are more likely to be poor, illiterate, victims of abuse and neglect, and recipients of inadequate health care. This situation violates human rights and threatens future development. A convention on the rights of older persons is one of the steps towards shaping a brighter future for older persons.

2. EVALUATING THE EXISTING HUMAN RIGHTS FRAMEWORK

The existing human rights framework of UN and regional treaties, principles, protocols and policy insufficiently protect the human rights of older persons.

2.1 The UN international framework is inadequate.

Older persons have no convention, special rapporteur or declaration dedicated to their interests. The rights of older persons are instead covered generally in current human rights conventions applying to all people. Targeted attention to the human rights of older persons has been left to less official policy-making strategies. This current international structure is inadequate for the following reasons:

2.1.1 The international framework neglects age and older persons. Age discrimination is mentioned only in the conventions protecting persons with disabilities

(CRPD) and migrant workers (ICRMW). While other conventions prohibit discrimination based on various distinctions, age is not specified. The ICRMW includes age as a protected distinction but fails to address older migrants and family members directly.

That the CRPD is the only convention to specifically mention older persons, and then only briefly, speaks volumes about prevailing attitudes on age and capabilities. Older persons have no separate section in the CRPD as women and children do. Rather, older persons are mentioned in the CRPD's discussion of social protection, poverty reduction, and access to health services for preventing further disabilities.⁴⁶⁸

Addressing older persons within these contexts, and not others, emphasizes the vulnerability of older persons without acknowledging their capabilities. Either the CRPD should have more fully incorporated older persons with disabilities or it should have left them out completely.

Even if it were possible, going back and inserting 'age' into every existing convention would be no remedy to the invisibility of older persons. Age is a category which includes every human and fails to focus on the concerns of older persons. Children as an age group have a convention.⁴⁶⁹ Most other age groups in the general population have insubstantial age-related human rights concerns. That children are appropriate subjects of a convention is not disputed. However, the statistics related to older persons provide incontrovertible evidence that older persons, too, are an appropriate subject for a convention.

2.1.2 The international framework is insufficiently coordinated. Not only are older persons virtually absent from current conventions, but the application of these conventions to older persons is generalized and diffused. Each existing convention applies to older persons in certain aspects but applies more specifically to some other targeted population group.

Conventions create committees of experts for the purpose of oversight, review of country reports, receipt of communications, and for further development of applicable norms. Older persons have no committee of similar status as groups such as women, children, migrants, and persons with disabilities have. The CEDAW committee has

⁴⁶⁸ CRPD note 207 at sections 28, 25.

⁴⁶⁹ United Nations *Convention on the Rights of the Child* (1989) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, UN Doc A/44/49, entered into force 2 September 1990.

lagged in its focus on older women. The ICESCR committee has numerous competing priorities within its purview.

The UN has worked around the absence of a convention and expert committee for older persons but efforts do not substitute for the official coordination which other groups benefit from.

2.1.3 The international framework omits essential topics. Older persons experience unique manifestations of human rights concerns which current conventions do not adequately cover. Violence targeted at older persons is a topic absent from current conventions⁴⁷⁰ as is the care giving burden placed on older persons (usually older women) generally and by the HIV/AIDS pandemic.⁴⁷¹ The state's role in protecting older persons from elder abuse needs development. The vulnerability of older persons at times of natural disaster or man-made crisis is uncovered in current conventions.

2.1.4 The international framework emphasizes vulnerabilities. Current conventions convey that older persons are vulnerable by virtue of their age as illustrated by the tendency to lump old age into one of several categories needing social security. Many of these conventions were drafted before global ageing gained widespread awareness. Workers in developed nations were retiring at earlier ages, only to live longer lives.⁴⁷² Developing regions even now remain focused on the concerns of women and children.⁴⁷³ The older conventions reflect a more passive view of older persons which the MIPAA decries.⁴⁷⁴ Policy documents clearly recognize the contributions of older persons but this recognition has yet to appear in treaties.

2.1.5 Older women are poorly covered in the international framework. The issues of older women languish in existing conventions. As noted earlier, CEDAW is silent on older women. The CEDAW Committee has only recently focused on the situation of older women. The CRPD fails to address older women despite their increased odds of suffering disabling age-related health conditions.

⁴⁷⁰ UN Expert Group note 120 at 3.

⁴⁷¹ Ferreira (2001) note 17.

⁴⁷² Holzmann note 63 at 31.

⁴⁷³ As evidenced by the Millennium Declaration note 360 above.

⁴⁷⁴ Madrid Plan note 73 at para 16.

2.1.6 UN policy on the rights of older persons is not binding. Policy efforts such as the MIPAA answer many of the above critiques. The MIPAA repeatedly recognizes and encourages the contributions of older persons while addressing the circumstances that create vulnerability. Older women's concerns are woven throughout the MIPAA. The MIPAA addresses specific topics such as the affordability of health care, elder abuse, care giving and support of care givers, and matters of competency.

What the MIPAA does not do, however, is create binding obligations or mechanisms for accountability. The MIPAA is a tool guiding those nations inclined to follow its recommendations. The MIPAA, alone, is not enough. The UN Secretary-General noted that even in 2009, awareness of the MIPAA is 'limited or non-existent' in parts of the world.⁴⁷⁵

The absence of a treaty for older persons implies that the human rights of older persons are of less concern than the rights of disabled persons, migrants, children and other groups with treaties. The absence of binding obligations implies that the human rights of older persons hold low priority.

While norms created outside of treaties can acquire the binding status of customary law,⁴⁷⁶ obligations acquire credibility more quickly when created through a purposeful law-making process rather than the relatively slow motion of custom and practice. If nothing else, purposeful law-making requires intent and communicates the importance of the subject matter.

Older persons are left exposed when human rights norms tailored to them are substituted with generalized norms applicable to all persons. Despite policy such as the MIPAA, older persons remain burdened with a host of human rights issues. The current international de jure system is defenseless against the de facto reality of older persons:

⁴⁷⁵ UN 2009 Follow-up note 53.

⁴⁷⁶ OHCHR *International Human Rights Law and the Role of the Legal Profession: A General Introduction* at pp 8-10; online: <http://www.ohchr.org/Documents/Publications/training9chapter1en.pdf> (accessed 29 October 2009).

‘The generic provisions of human rights law are refracted through discriminatory attitudes and practices and hence do not sufficiently protect older people.’⁴⁷⁷

2.2 The regional frameworks are inadequate.

The regional human rights systems apply only to those countries within each region. As noted above, large regions of the world operate outside of these regional systems. An evaluation of these systems pertains only to their adequacy to the populations they claim to serve.

The regional systems suffer from many of the same defects that the UN system does. Older persons currently have no dedicated binding treaty under any of the regional systems. Like the UN system, older persons are mentioned within treaties addressing other populations or human rights in general. The African protocol on women is binding and covers older women but older men are, of course, excluded. The European Charter of Fundamental Rights prohibits age discrimination and recognizes the rights of older persons, but does not elaborate on those rights. Within the Inter-American system, the Protocol of San Salvador contains a section on the protection of older persons as it does children and the handicapped. Arab documents speak briefly of the protection of older persons. None of these mechanisms thoroughly covers the rights of older persons.

The regional systems tend especially to emphasize the vulnerability of older persons and the need to respect and protect them. While topics such as independence and participation receive note, they remain underdeveloped. The vast majority of themes and concerns of older persons are missing from the regional documents, particularly recognition and encouragement of the contributions of older persons in all aspects of life.

The African system deserves credit for incorporating older women into its Protocol on women and for developing its ageing policy prior to the MIPAA. Further, the African Commission on Human and Peoples Rights has established a working group to research the concerns of older persons with the ultimate view of creating one or more

⁴⁷⁷ Lindsay Judge *The Rights of Older People: International Law, Human Rights Mechanisms and the Case for New Normative Standards* (2009) Background briefing paper for International Symposium on the Rights of Older People at 16; online: [http://www.ageconcern.org.uk/AgeConcern/Documents/International_Symposium\(Judge_-_international_law\).pdf](http://www.ageconcern.org.uk/AgeConcern/Documents/International_Symposium(Judge_-_international_law).pdf) (accessed 28 October 2009).

mechanisms to enhance the human rights protections for older persons. Despite thorough treatment of the issues of older persons in Africa, the AU's ageing policy falls short with its approach towards older women. The topics of poverty, social welfare, the family, education and epidemics make no specific mention of how they impact on older women.

3. BENEFITS OF A CONVENTION

Magnified through a convention, the human rights lens brings conceptual and analytical value to the experiences of older persons. A convention would comprehensively articulate how particular human rights impact the lives of older persons. A convention would establish obligations against which violations could be evaluated. At a practical level, gathering ageing initiatives under one convention could reduce duplication of efforts and maintain focus on matters of priority. A coordinated effort could lessen the potential for distortion of issues and promote a balanced approach towards addressing the human rights of older persons. For example, health care concerns of older women currently fall within the jurisdictions of several entities – the ICESCR committee, the CEDAW committee, the CRPD committee and the WHO. How each of these entities chooses to address and prioritize a particular aspect of older women's health – gender based abuse for instance – could vary immensely. A convention for older persons, and the committee it would create, would lead and coordinate the analysis.

From a development perspective, the reporting requirements of a convention could assist governments in facing the impending impact of population ageing. If the human rights obligations of governments are clarified, then chances improve that those rights influence policy. The gift of accountability which country reports offer could translate into economic and human development gains for economies. By forcing governments to focus on the concerns of its older persons, leaders may awaken to the development benefits of acting on those concerns. A recent review of country reports to existing

convention committees found only a small percentage address the concerns of older persons.⁴⁷⁸

A convention, and the drafting process which brings it to fruition, could only enhance the visibility of older persons and their concerns. A convention which encourages research and data collection would deepen the knowledge base about ageing. A convention could persuade funders to include older persons as a priority, leading to the growth of organizations serving the older populace.

A convention which emphasizes the contributions of older persons and the benefits to be gained by addressing their human rights concerns could encourage a shift in attitudes about older persons. As they seep into all aspects of life, improved images and perceptions about older persons could influence law, policy and practice. When older persons are seen as capable and active, opportunities for adult education, for public participation and for volunteer service may increase.

An argument could be made that sufficient articulation of the human rights of older persons is developing without a convention. Policies, principles, and plans have filled the gap in the absence of a convention. The MIPAA exhibits keen awareness of both human rights and development issues affecting older persons and provides guidance to nations seeking to address the issues of older persons. Is this not enough? The key to the success of this argument relies, however, on the whim of political will. If interest groups believed that political will and good intentions suffice, the need for future conventions would be eliminated. The fact that UN conventions were recently adopted for persons with disabilities and for migrant workers, however, is evidence of the opposite. Clearly the conviction remains that binding conventions bring value to the realization of human rights. The existing human rights framework around older persons is a structure built on sand. Without a foundation securely grounded in a convention, older persons sit vulnerable to the shifts and vagaries of political will.

Nevertheless, the usefulness of human rights conventions is far from universally accepted.⁴⁷⁹ Conventions are enacted and human rights violations persist. One commentator has remarked that '[b]y setting the bar high, rights approaches can

⁴⁷⁸ Judge note 477 at pp 12,13.

⁴⁷⁹ For discussion, Doron note 190.

become disconnected from the reality of hard choices' which governments face.⁴⁸⁰ In varying degrees, the dichotomy between human rights aspirations and human rights realization exists within all regions of the world.

To argue, however, that future conventions hold no merit because existing conventions seemingly fail to motivate immediate, concrete improvements is to ignore the nature of change. Change of the magnitude envisioned by human rights is a gradual process occurring over time:

...notwithstanding [progress], broader policy developments or legislation changing social reality is considerably more difficult as power relations, social structures and the weight and force of customs and tradition often stand as an obstacle to change.⁴⁸¹

It is premature to pronounce judgment on the efficacy of human rights instruments against the vast array of the world's cultures and political/economic systems. One study of human rights treaties found that while treaties 'so often appear to have no statistically significant effect on practices,' it may be partly due to 'heavy resistance of nations' human rights practices to change.⁴⁸² The UDHR is but sixty one years old - just a sapling in the age-old forest of human rights violations.

The situation of older persons will not magically improve with a convention. In reality, binding conventions rely on the voluntary nature of political will just as policy does. What a convention will do, however, is raise the profile of older persons and increase exposure; provide focus and visibility; create awareness; provide motivation for national policies; provide articulation and coherence; give the MIPAA and future similar efforts greater credibility; stimulate both private and public funding; encourage the growth of organizations for older persons; and encourage research.⁴⁸³

A recent critical analysis of the general value of UN conventions and of the potential value of a convention for older persons came to the following conclusion:

It is our view that if the proper process is adopted...the positive potential overrides the negative. We do not hold that without a treaty for the rights of older persons, they could not be afforded with rights, or that the treaty would be a panacea. However, we do hold that based on past experience, such a treaty could serve

⁴⁸⁰ Judge note 477 at 15.

⁴⁸¹ Kollapen note 3 above at 5.

⁴⁸² Hathaway note 467 at 2002.

⁴⁸³ For discussion, see Sleep note 465.

as a solid foundation for a process which eventually would bring positive change to older persons around the world...⁴⁸⁴

The ball is already rolling. The past and existing efforts of the UN, regional organizations, private organizations, academia and medical community, are applauded. These efforts are developing largely in isolation, however. Coordination of future efforts will hopefully produce a critical mass which bears measureable fruit experienced in the daily lives of older persons.

4. WHAT SHOULD A CONVENTION EMPHASIZE?

4.1 Introduction. A UN convention on the human rights of older persons must be the product of interdisciplinary and cross-cultural cooperation and consultation. A human rights approach to ageing must be guided by the wealth of knowledge which the geriatric and gerontology communities already possess. The expertise of organizations representing the interests of older persons must be sought. The diverse experiences of the world's regions, both developing and developed, must inform the convention drafting process.

A convention for older persons need not reinvent the human rights wheel. A convention's substance can be derived from existing resources, such as the MIPAA and its follow up documents, which comprehensively outline the human rights concerns of older persons. The MIPAA contains recommendations on each of the areas of concern discussed in this paper and would serve as a pivotal blueprint for articulating norms and obligations in a convention. A convention's structure can start with the CRPD as a model.

The daunting practicalities and politics of drafting and adopting a UN convention are topics for another day. This essay does not pretend that a convention can materialize without substantial debate and compromise. Where committed leadership would emerge from is uncertain. Nevertheless, the calls for a convention must coalesce into a unified chorus that rises over the drone of practicalities.

⁴⁸⁴ Doron note 190 at para 3.4.

This section will discuss issues of priority for a convention on the rights of older persons. Rather than attempting to comprehensively catalogue each and every topic which might be covered in a convention on the rights of older persons, as is ably done by the MIPAA, this section highlights structure, themes and a few specific topics for a convention.

4.2 Heterogeneity. A convention must emphasize the heterogeneity of older persons, as ‘the general tendency for policy makers around the world has been to treat all old as a homogenous group.’⁴⁸⁵ Older men and older women have different experiences and needs. The younger old (60 - 79 years) have different experiences and needs than do the oldest old. Cultural factors impact ageing. Some older persons coast through older age with few health problems while other persons are bombarded by age-related health problems. Individuals experience ‘life transitions’ as they grow older but do so at varying ages: ‘while chronological age is a convenient way to define ageing, there is considerable variation in the situation and needs of any person at any given age.’⁴⁸⁶ Older persons share common aspects of their lives while other aspects of their lives which greatly differ. Attitudes towards older persons need to acknowledge this duality.

4.3 Attitudes. Attitudes have a rippling effect on all aspects of older persons’ lives and impact whether they are treated with dignity. A convention must seek to reshape negative and inaccurate stereotypes about the roles and capabilities of older persons. The media must be encouraged to join in ‘combating the stigma, tackling the taboos and helping to de-stereotype older people’⁴⁸⁷ in order to reduce the impact of ageism.

The language and structure of the convention can influence attitudes. Undue emphasis on the needs and vulnerabilities of older persons reflects an impoverished view of ageing and risks perpetuating destructive stereotypes while ignoring the capabilities of older persons.⁴⁸⁸ Instead, drafters must infuse the convention with a spirit of empowerment aimed at enabling older persons to experience ageing as an opportunity to participate and contribute. Better health care, enhanced adult education

⁴⁸⁵ Centre for Gerontological Studies note 163.

⁴⁸⁶ Knodel note 164 at 3.

⁴⁸⁷ WHO Toronto Declaration note 110.

⁴⁸⁸ UNHCR (2007) note 14 at para 14.

opportunities, community centers which provide forums for support and solidarity, legal protections for older persons, consistently positive images of older persons - these things and more can serve to establish a proactive perspective on ageing.

The CRPD is a recent convention which expresses a broad and nuanced perspective of the human rights concerns of its population target.⁴⁸⁹ The CRPD aims to lower barriers to participation and facilitate empowerment rather than dwelling on the 'problems' faced by persons with disabilities. Themes of individual autonomy, dignity, independence, and freedom of choice imbue the CRPD with an enabling tone rather than one of charity or pity. Issues related to health care, discrimination, education, poverty, and violence and abuse are treated not only as critical topics in their own right but also as obstacles to choice and participation.

4.4 Dignity and autonomy. The right to dignity is articulated in the UDHR, ICCPR and ICESCR.⁴⁹⁰ A convention must repeatedly reaffirm the dignity, independence and autonomy of older persons. Such notions impact all stages of life but get muddled amidst the complications of older age. Choice and having a voice – both essential to a sense of autonomy – must be carefully guarded for older persons.

Collectively, older persons need opportunities and forums for adult education,⁴⁹¹ to enhance their cultural and political participation in society,⁴⁹² and to raise their voices in advocacy. A convention must encourage government and civil society to create these spaces and places, whether community centers, workshops, associations or public hearings, and in both urban and rural settings.

'Choice in when to retire, choice in where to live'⁴⁹³ – these are themes echoed throughout the ageing world. Having a choice requires options to choose from. A convention must support laws and policies with flexible retirement ages and work schemes, such as part time arrangements. Further a convention must obligate both government and private initiatives to explore a range of residential and care options that are appropriate for an older person's particular situation.

⁴⁸⁹ CRPD note 207.

⁴⁹⁰ UDHR note 193 at section 1; ICCPR note 197 at Preamble; ICESCR note 198 at Preamble.

⁴⁹¹ See UDHR note 193 at Article 26; ICESCR note 198 at Article 13; CEDAW note 166 at Article 10, for the right to education.

⁴⁹² See UDHR note 193 at Article 19 and ICCPR note 197 at Article 19.2, for freedom of expression.

⁴⁹³ Canadian Special Senate Committee note 21 at 5.

Choice is impacted by one's capacity to choose. A Canadian Senate report noted that, unfortunately, 'chronological age has provided an expedient proxy to competency.'⁴⁹⁴ Competency exists on a continuum and is affected by numerous factors including but not limited to age.⁴⁹⁵ Stereotypes about older persons often reflect assumptions about their cognitive capabilities.

The right to be free from arbitrary interference with one's privacy, family, home and reputation is guarded by the UDHR and ICCPR.⁴⁹⁶ A determination of incompetency has far reaching consequences which interferes with these personal matters. A convention must press the medical and legal communities to devise methods for accurately assessing competency and protecting older persons when competency is questioned. The degree of competency varies based on the particular decision-making situation and policies must impose the least restrictive measures as appropriately possible. While older disabled persons are implicitly covered by the CRPD's language on this topic,⁴⁹⁷ competency must be carefully covered in a convention for older persons.

4.5 Poverty reduction. The right to an adequate standard of living is established in the UDHR and the ICESCR. A convention must obligate nations to address the poverty experienced by older persons. Not only do poverty alleviation measures, such as old age grants and pensions, benefit older persons but they have been shown to benefit entire families.⁴⁹⁸ Older persons with more income are better able to care for grandchildren, allowing parents to be economically productive. Where older persons are parenting orphaned grandchildren, they are better able to do so when provided with necessary services and grants.

A convention must encourage nations to creatively explore employment, self-employment and credit policies which support older workers, thus allowing able older persons to maintain financial independence from family members and from government grant programs.

⁴⁹⁴ Canadian Special Senate Committee note 21 at 16.

⁴⁹⁵ As discussed in Jennifer Moye and Daniel C. Marson *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research* 62B/1 Journal of Gerontology: Psychological Sciences 3-11 (2007).

⁴⁹⁶ UDHR note 193 at section 12; ICCPR note 197 at section 17.

⁴⁹⁷ CRPD note 207 at section 12.

⁴⁹⁸ Kinsella note 5 at 128.

4.6 Health care. The ICESCR recognizes the right to the 'enjoyment of the highest attainable standard of physical and mental health.'⁴⁹⁹ A convention must stress development of health care policies which attend to an ageing population and stress healthy ageing. Appropriate and accessible health care is an essential rung in the ladder leading to enhanced human rights for older persons. The WHO's position is that '[g]ood health is imperative for older people to remain independent and continue to contribute to their families and communities.'⁵⁰⁰

Accessibility of health care includes affordability.⁵⁰¹ The cost of medical care and of prescription drugs, in particular, is a priority concern for older persons in countries which do not provide universal health care.⁵⁰² Older persons who live on fixed incomes may fail to take necessary medication, with negative health consequences.⁵⁰³ A convention must urge the creation of policies to reduce the cost of drugs for low-income older persons.

Geriatric medicine must be encouraged and strengthened for the medical community to adequately care for its older patients.⁵⁰⁴ The quality of health care, including health care providers with appropriate skills, is part of the right to the highest attainable standard of health.⁵⁰⁵ Health care professional must be aware of and sensitive to signs of elder abuse.⁵⁰⁶ The rights and dignity of terminally ill older persons must be protected within the scope of palliative care.⁵⁰⁷

4.7 Care giver support. Supporting care givers related directly to the right to the highest attainable standard of health in the ICESCR.⁵⁰⁸ Care givers are the most basic element of any health care system. A convention must emphasize the needs of those who care for vulnerable older persons. Care givers of all ages face 'physical, mental,

⁴⁹⁹ ICESCR note 198 at Article 12.

⁵⁰⁰ WHO Plan note 92 at para. 4.

⁵⁰¹ ICESCR Committee GC 14 note 264 at 12(b).

⁵⁰² Usha Sambamoorthi et al *Total and Out of Pocket Expenditures for Prescription Drugs for Older Persons* 43:3 *The Gerontologist* 345-359 at pp 357-358 (2003).

⁵⁰³ Michele Heisler *The health effects of restricting prescription medication use because of cost* 42(7) *Medical Care* 626-634 at 633 (2004).

⁵⁰⁴ WHO Plan note 92 at para 7.

⁵⁰⁵ ICESCR Committee GC 14 note 263 at para 12(d).

⁵⁰⁶ WHO Elder Abuse note 114 at 2.

⁵⁰⁷ Kathleen Brodrick and Nelia Drenth 'Palliative Care for Older Persons' in *Legal Aspects of Palliative Care* (2009) ed Liz Gwyther (Hospice Palliative Care Association of South Africa – Pinelands); online <http://www.hospicepalliativecaresa.co.za/legal.html> (accessed 22 October 2009).

⁵⁰⁸ ICESCR note 198 at Article 12.

emotional, and financial challenges.⁵⁰⁹ Without respite services, training and support, care givers may jeopardize their own health, suffer 'burn out' and neglect or abuse those under their watch.⁵¹⁰

Most care of frail older persons is still provided by family and friends in all regions of the world.⁵¹¹ If families are to continue shouldering the burden of caring and supporting for older persons, then families must be supported and encouraged.⁵¹² A convention must encourage a variety of mechanisms: employment leave policies allowing care to family members of all ages; tax and other incentives for households with older family members; respite and day care services; legal support such as guardianship services; community centers and support groups. It behooves any government to enhance the capacity of families to care for their older members, rather than being left with the responsibility and ever-increasing. Encouraging and enabling the voluntary care giving of older family members carries greater strategic chance of success than do calls for familial care giving to become a legal responsibility,⁵¹³ as already is the case in India.⁵¹⁴

A convention must also address the needs of those older persons who care for spouses or other family members. The indispensable role of older persons as care givers, particularly in the HIV/AIDS context, has been acknowledged and now must be concretely supported. Policies aimed at older care givers must address the economic, psychosocial and health impacts on older persons of care giving.⁵¹⁵

4.8 Protection. A convention needs to address the ways in which older persons are vulnerable and how they can be protected. Older persons have the rights to live with dignity, to be treated humanely, and to be free from discrimination. Laws, policies

⁵⁰⁹ Canadian Special Senate Committee note 21 at 41

⁵¹⁰ Canadian Special Senate Committee note 21 at 29.

⁵¹¹ Canadian Special Senate Committee note 21 at 41, noting that 80 per cent of care to frail older persons is provided informally by family and friends.

⁵¹² For discussion, see: Hermalin et al *Future Characteristics of the Elderly in Developing Countries and Their Implications for Policy* (2006) Research Report 06-62 Population Studies Center University of Michigan; online www.psc.isr.umich.edu/pubs/pdf/ea06-62.pdf (accessed 28 October 2009); Knodel note 163.

⁵¹³ AU Policy note 20 at section 4.1(h).

⁵¹⁴ India *The Senior Citizens (Maintenance, Protection and Welfare) Bill, 2006* (2006) at section 4.

⁵¹⁵ See, e.g. HelpAge Forgotten Families note 85: United Nations Economic and Social Council *Emerging Issues and Developments at the Regional Level: Emerging Social Issues* U.N. Doc. E/ESCA/1280 (2003) at 10.

and organizations can assist to protect these rights and to enable older persons to protect themselves.

Older persons are often victims of consumer fraud and fall prey to scams.⁵¹⁶ Older persons are discriminated against, legally and in practice. Older persons suffer neglect, abuse and violence. A convention must obligate nations to work towards eradicating these situations by enacting laws, making older persons and their families aware of their rights and remedies, and establishing social services.

4.9 Research. A convention must support research, studies and data collection disaggregated by age and sex in order to accurately assess current issues and emerging trends affecting older persons.⁵¹⁷ Lack of information and research on all aspects of ageing is a global problem⁵¹⁸ and creates policy arguments weakened by anecdotal evidence. Informed policies require reliable research which is lacking on a number of issues related to older persons including, screening techniques for health care professionals to detect elder abuse.⁵¹⁹

4.10 Flexibility. Ageing is a process, not a destination. A convention must capture the rapidly evolving nature of older populations. The education levels of older persons should improve beyond the next four decades due to global emphasis on childhood education. Continued advancements in geriatric medicine and general health care will likely bring a healthier older population. A better educated and healthier older population may have unique employment-related concerns or expect a broader range of residential and care options. A convention for older persons must emphasize the fluidity of the ageing experience and encourage ongoing dialogue about the human rights of older persons. A convention must encourage flexible policies which allow for new interpretations of the ageing experience.

⁵¹⁶ United States Federal Bureau of Investigation *Fraud Target – Senior Citizens* ;online: <http://www.fbi.gov/maicases/fraud/seniorsfam.htm> (accessed 28 October 2009).

⁵¹⁷ Knodel note 164 at 108.

⁵¹⁸ International Longevity Center Global Alliance note 100 at 11.

⁵¹⁹ WHO Elder Abuse note 92 at 2.

5. HOW A CONVENTION SHOULD HANDLE OLDER WOMEN

5.1 Gender versus women. The topic of gender must be addressed in a manner sensitive to both older women and men. Various gender-related issues affecting men or women will surface and evolve over time. A convention must encourage alertness to emerging issues while addressing the issues which exist now and into the foreseeable future.

Sensitivity to both genders must not, however, dilute focus on the issues of older women. As affirmed throughout this essay, women currently experience older age with greater challenges than do men. This is not to say that men breeze through older age without a care. However, every source examined for this essay supports the 'the special vulnerability of older women.'⁵²⁰ To ignore this fact in the name of gender-correctness is to ignore and thus continually stumble over the elephant sitting in the middle of the room.

The University of Michigan Population Studies Center report discussed above is case on point. This 2008 study confirms what all other research reveals: substantial gender differences exist in all sectors affecting older persons - health, education, poverty - to the disadvantage of women. The report contains nothing which contradicts the generalization that older men, while affected by lower life expectancies, fare better during their lifetimes. Yet, the report discounts emphasis on older women's concerns:

Although the majority of the older population are women, it is important to keep in mind that still a substantial share are men. This tends to be overlooked in numerous discussions of population ageing which typically emphasize the feminization of ageing and as a result focus only on women when considering gender specific needs of older persons.⁵²¹

The decreased life expectancy of men, despite men's lifetime advantages as expressed through poverty, education and health indicators, is certainly a topic for research and analysis but not at a cost to older women's issues. Skillful and sensitive draftsmanship can assure that a convention pays proper respect to the gender

⁵²⁰ UN Expert Group note 120 at 16.

⁵²¹ Knodel note 164 above at 15.

dimensions of ageing for both men and women while pragmatically addressing the realities faced by older women.

A convention must avoid using the word ‘gender’ as a code word for ‘women’. While ‘fairness’ and political mileage may seemingly be gained by appearing to treat men and women equally, a careful reading of most policies on ageing reveals that references to a gender perspective are, in fact, most often about women. In cases where issues of gender – men, women or both – are truly a concern, then the word ‘gender’ should be used. Where an issue primarily affects one gender or the other, however, then either women or men should be specified.

5.2 Structure: integration versus emphasis. A convention’s structure must do two things: integrate gender into each topic *and* contain a separate section on older women. The current strategy in ageing policy and analysis tends to focus on the former.

The difference between integrating older women’s concerns and highlighting those concerns is significant. Just as the concerns of older persons remain unfocused by the current generic applicability of existing human rights treaties, so remain the concerns of older women when buried within the broader discourse on older persons.

The AU’s ageing policy is an example of integrating gender but failing older women. The policy thoroughly outlines and describes the issues which impact ageing. While many of the topics do mention women or gender, the topics which omit women are notable. Witchcraft allegations are mentioned without noting that women are the primary victims.⁵²² Poverty is addressed without noting that women are more likely than men to be poor.⁵²³ The care of orphaned grandchildren is discussed without noting that older women are the primary caregivers.⁵²⁴ Gender is discussed in a separate section within the policy but the overwhelming hardships faced by older women are made comparable to the situation of older men ‘without a family who may be more vulnerable than women who tend have more domestic skills.’⁵²⁵

⁵²² AU Policy note 20 at section 4.1

⁵²³ AU Policy note 20 at section 4.3

⁵²⁴ AU Policy note 20 at section 4.7.

⁵²⁵ AU Policy note 20 at section 4.13.

The CRPD is a recent example of a convention which integrates gender and sex in its topics but also gives women with disabilities a separate (albeit limited) section. The CRPD's Preamble emphasizes the need to incorporate a gender perspective⁵²⁶ and gender is mentioned in sections addressing stereotypes,⁵²⁷ violence and abuse,⁵²⁸ and health services.⁵²⁹ However, the CRPD acknowledges that women and girls face certain greater risks.⁵³⁰ Women and girls have a separate section in the CRPD⁵³¹ and are singled out for attention in the section addressing access to social protections.⁵³² Nowhere does the CRPD make particular reference to men, reflecting that women currently live with most gender-based disadvantages.

CEDAW gives rural women a separate section.⁵³³ The African Protocol on Women gives special sections to elderly women and women with disabilities.⁵³⁴ There is precedent and logic in giving older women separate attention in a convention for older persons.

5.3 Attitudes. While a convention must address ageism in general, stereotypes about older women are particularly insidious. The mix of sexism and ageism contributes to violence and abuse while limiting the contributions of older women.⁵³⁵ A convention can encourage positive images of older women and emphasize their essential contributions.

Attitudes and practices which support gender stereotypes and disproportionate burdens on one gender or the other (i.e. child rearing and care giving; household chores; income earning responsibilities) can shift over time. Overemphasis on the burdens created by women's traditional roles can serve to lock women in these roles. Recommendations to 'promote and support greater male responsibility in the family, including caring for older persons' may assist in reevaluating these traditional roles.⁵³⁶

⁵²⁶ CRPD note 207 at Preamble (s).

⁵²⁷ CRPD note 207 at Article 8.1(b).

⁵²⁸ CRPD note 207 at Article 16.

⁵²⁹ CRPD note 207 at Article 25.

⁵³⁰ CRPD note 207 at Preamble (q).

⁵³¹ CRPD note 207 at Article 6.

⁵³² CRPD note 207 at Article 28.2(b).

⁵³³ CEDAW note 166 at Article 14.

⁵³⁴ AU Protocol note 385 at sections 22, 23.

⁵³⁵ CEDAW Committee Decision note 138 at para 36.

⁵³⁶ United Nations Emerging Issues note 512 at 6.

5.4 Abuse and violence. A convention must encourage nations to confront gender-based violence against older women through law, policy and awareness. Where cultural beliefs play a factor in a harmful practice, such as witchcraft murders of older women, criminal laws alone might prove to be an ineffective remedy. Policies which target the systemic factors supporting those cultural beliefs might prove better tools. For example, the provision of government grants or pensions to older women could enhance their economic worth to a poor household.⁵³⁷ After an old-age pension was enacted, South Africa saw a decrease in violence attributed to witchcraft.⁵³⁸ While serving to reduce poverty amongst older women, law changes which grant women inheritance and property ownership rights could backfire when witchcraft accusations stem partly from a desire to gain access an older women's assets.⁵³⁹

Obviously, a convention cannot specifically address every variable affecting the abuse of older women. A convention must emphasize, however, that older women are especially affected by elder abuse and that each nation must combat abuse and violence directed at older women in whatever manner manifested.

6. ESSAY CONCLUDING REMARKS

'...one cannot compare the attractiveness of issues related to children and those related to older persons; the latter issues are simply not sexy enough.'

Alexandre Sidorenko⁵⁴⁰

To avoid the issues of older persons for lack of appeal is to turn a blind eye to the future of each person who hopes to age with relative well-being and prosperity. This essay has examined the hardships which older persons face. These hardships translate into human rights issues. The capacity for older persons to contribute to economic and social development remains hidden – a golden treasure yet to be discovered amidst the rubble of poverty, abuse, poor health and education. Existing human rights documents and policy provide unfocused, uncoordinated and inadequate tools for uncovering this golden treasure.

⁵³⁷ Miguel note 117 at 1170.

⁵³⁸ Ibid.

⁵³⁹ See HelpAge Statement note 175: 'Older, widowed women who live alone are particularly vulnerable to accusations and attacks related to property and inheritance.'

⁵⁴⁰ Sidorenko note 74 at 16.

The time for a United Nations convention on the rights of older persons is now. In the next few decades, the growth of the older population will explode. As the costs and implications of an ageing population become apparent, policies will shift in response. If the rights of older persons are not fully articulated and entrenched, these policy shifts may act to the detriment of older persons. A human rights lens can frame the experience of ageing so that older persons are situated to participate, contribute and be protected.

A human rights convention is not the only approach for addressing ageing themes. In the wagon wheel which carries forward the concerns of older persons, however, a convention could serve as the hub to which all other approaches are linked. Creating linkages and coordinating efforts would enhance the efficiency of all approaches.

The advancement of all people needs all people. As the experience and judgment of older persons must be valued, so must the new ideas of younger persons. And just as persons of all ages must collaborate, so must countries at all levels of development. Nations already grappling with a larger aging population must share their experiences to enable those countries with a current younger population base to sidestep the same problems. These 'younger' countries must engage in the global discussion on ageing.

A convention must embrace the intertwined natures of development and human rights. The interwoven themes of tackling the ageing population are aptly summarized in the MIPAA:

The task is to link ageing to other frameworks for social and economic development and human rights. Whereas specific policies will vary according to country and region, population ageing is a universal force that has the power to shape the future as much as globalization. It is essential to recognize the ability of older persons to contribute to society by taking the lead not only in their own betterment but also in that of society as a whole. Forward thinking calls us to embrace the potential of the ageing population as a basis for future development.⁵⁴¹

Older women must be featured in a convention. As the numbers of the oldest old multiply at a record pace, greater longevity will place older women at the forefront of ageing issues. For as long as women remain more likely than men to age with extra hardships, a special focus on older women must exist. No doubt older women will gladly

⁵⁴¹ Madrid Plan note 73 at para 15.

relinquish special focus when the day comes that men and women face comparable ageing experiences.

The ageing phenomenon is forcing older persons out of the human rights shadows and into the spotlight. Older persons cannot be ignored without economic and societal consequences. More importantly, older persons should not be ignored by the human rights community because their unique issues, needs and capabilities demand and deserve the same respect accorded other population groups.

The world needs what older men and women have to offer. One of the world's most revered persons is Nelson Mandela, age 91. He was age 75 when he became South Africa's first post-apartheid president, a symbol of humanity and forgiveness worthy of the 1993 Nobel Peace Prize.⁵⁴² Mother Theresa continued her 1979 Nobel Peace Prize winning work until her death at age 87.⁵⁴³ Just as the global population is 'coming of age,'⁵⁴⁴ so must the human rights of older persons.

⁵⁴² African National Congress at <http://anc.org.za/people/mandela.html> (accessed on 26 October 2009).

⁵⁴³ Mother Teresa of Calcutta Center at <http://www.mother.teresa.org/layout.html> (accessed on 26 October 2009).

⁵⁴⁴ United Nation Proclamation note 242 at para 1(l).

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